PUBLIC VERSION

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In the Matter of	)	
DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS	)	**Docket No. 2005-1 CRB DTRA**

REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW OF SOUNDEXCHANGE, INC.

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December 15, 2006

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TABLE OF CONTENTS

INTRODUCTION

1. This is a case about the value of sound recordings. The Court is tasked with determining the royalty a "willing buyer" and a "willing seller" would settle upon for a blanket sound recording license were it not for the fact that the license in this case is compulsory and fixed by the Court. Though this task is complicated and the record enormous, the Court is fortunate in two respects:

2. *First*, the statutory standard which the Court is to apply is clear and straightforward, and there is now a body of precedent upon which the Court may rely which establishes that the statutory standard's plain meaning is indeed the meaning that governs; and

3. *Second*, digital music services, and webcasting services in particular, are no longer in their infancies. There are real businesses, with real costs and revenues, and real contracts with record companies that provide valuable guidance to the Court as it considers what a willing buyer and a willing seller would do in this market.

4. SoundExchange takes full advantage of these considerations. It takes as a given the statutory standard, and does not re-argue points it unsuccessfully raised in the prior proceeding. And it takes full advantage of the far more robust data available both on a public and confidential basis. Both its "surplus" analysis undertaken by Dr. Brynjolfsson and its benchmark analysis undertaken by Dr. Pelcovits are by design structured to take full advantage of marketplace data that for the most part was not available at the time of the prior proceeding. The result is a rate proposal supported by a far larger and richer set of empirical market data than available in prior proceedings.

5. In contrast, the most striking thing about the webcasters' Findings of Fact and Conclusions of Law is that they are rebelling against both these considerations:

6. Though the statute clearly states that the Court is to attempt to set a rate that would be achieved in the open market, and though predecessor tribunals have given this statutory command its plain meaning, the webcasters offer a counter-textual construction of the statutory standard that was squarely rejected by the previous tribunal. Dr. Jaffe candidly acknowledges that the rate the webcasters propose is substantially *lower* than a rate that would be negotiated in the market absent a statutory license, Jaffe Reb. Test. at 214-15, because, in webcasters' view, the Court must construct a different hypothetical market with different hypothetical sellers who compete in what the webcasters insist would be an almost "perfectly competitive" market, and not a real-world market.

7. Based on that legal position, the webcasters reject as irrelevant virtually all of the real-world evidence in the record, since that evidence is "tainted" by real-world conditions reflecting less than perfectly competitive markets.[1] Remarkably, it is the webcasters' view that with one exception *nothing* about the record companies should be considered — not any of their contracts, not any of their expenses, not any of their costs. Nor are the webcasters particularly willing to discuss their own growing revenues and declining costs. Instead, the Court is invited to create a hypothetical market from scratch, and set royalties in that market based on a benchmark involving a different product priced under consent decrees applying different standards.

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[1] Dr. Jaffe's unwillingness to use actual data from real markets is so reflexive that he declined to use actual SESAC rates to calculate the amounts paid for musical works extends, since in his view SESAC's whopping 3 percent share of the market gives it too much market power. Jaffe Reb. Test. at 272-73.

8. As a result, SoundExchange's Findings of Fact are full of extensive detail drawn from the record, concerning real world conduct and real-world analysis of the economics of the webcasting industry and the record industry. The webcasters Findings of Fact, in contrast, are full of arguments about why the Court should ignore this evidence.

9. The effect of the webcasters' reliance on hypothetical markets is clear. In the real world, the record companies recover a significant share of the revenue that digital music services collect by exploiting sound recordings — whether through reproduction, distribution, or performance, through sale or license, through interactive or non-interactive services, or through audio-only or audio-visual works. That is because each sound recording is unique, and sound recordings are highly valued by consumers. The prices the record companies receive in open market transactions thus reflect in the end the high value consumers place on sound recordings. The webcasters are fighting the law and fighting the facts because they want to keep for themselves the larger part of that value created by the record companies, even though that is never what occurs in the unregulated marketplace.

10. SoundExchange respectfully suggests that when this Court reviews the law and reviews the facts, it will conclude that a royalty payment that reflects a blanket license that a willing buyer and a willing seller would reach closely resembles the royalty payment proposed by SoundExchange, and not that proposed by the webcasters.

The Legal Background

11. The statute calls for the Court to consider a rate that would be reached by a willing buyer and a willing seller. By its plain terms it does not call for the Court to adjust that rate in any way, or to make any assumptions one way or the other about the competitive situation

of the buyer and the seller. In the previous proceeding the tribunal concluded that the words of the statutory standard should receive their plain meaning. The CARP concluded that the "willing buyers" should be the actual services which take advantage of the compulsory license, and the "willing sellers" should be the actual record companies that own the sound recording copyrights that make up the compulsory license. *See* Webcaster I at 24. The Librarian agreed. Librarian's Decision at 45244.

12. In so doing, the previous tribunal rejected the same argument that the webcasters restate here, asking the Court to take a more interventionist, regulatory, role. They urged the CARP to reject the statute's plain meaning on the ground that the record companies in the real world had market power, and that one of the unstated purposes of the statute must have been "to prevent the exercise of market power [by the RIAA or the record companies]." Webcasting I at 22 (brackets in original) (characterizing DiMA's claim). The CARP in Webcasting I gave this argument short shrift. It found no basis for this view in the words of the statute, and "no Copyright Office or Copyright Royalty Tribunal precedent for the Services' 'competitive market' construct in the compulsory license context." *Id.* at 23.

13. Based on this legal conclusion, the CARP accepted as a benchmark a real-world agreement between Yahoo! and the RIAA. It rejected the results of a model proposed by the webcasters based on a claim that the musical works and sound recording copyrights were analogous. And it also rejected proposed benchmark agreements that it concluded were not arms-length, and thus not representative of real world agreements that would have been entered into in a world in which there was no statutory license.

14. This Court should do the same, either as a matter of *stare decisis,* or by rejecting the webcasters' arguments on the merits. It should find that the statute means what it says, and accept benchmarks drawn from representative, real-world, agreements between sophisticated record company sellers and sophisticated webcaster buyers and adjust for any relevant differences from the benchmark market to the target market. And it should reject the webcasters' benchmark for many of the same reasons it was rejected by the previous tribunal, for it is based on too many assumptions that cannot be verified, and makes no attempt to account for the very obvious differences between the benchmark market and the target market.

The Record Companies' Market Power

15. The webcasters continue to argue that this Court must do what the previous tribunal refused to do and adjust the rates that would result from a market-based transactions to take account of the record companies' "monopoly" market power.

16. But the *facts* are that in the real world the record companies, the webcasters, and multiple other distributors, participate in vibrant markets that result in artists creating music, multiple distributors distributing that music, and hundreds of millions of consumers paying the prices and enjoying the products that these markets generate. It may be that these markets are not "perfect" in the eyes of economists — few if any are. But they are what are called "workably competitive" markets, and the webcasters' suggestions that this Court should try to "perfect" these market results through rate adjustments is bad policy, bad law, and without any record evidence on which to support such an adjustment.

17. Nonetheless, the webcasters through their expert Dr. Jaffe point to two feature of these functioning markets that they deem worthy of correction. They say that the record

companies are too concentrated, and they say that a peculiar feature of all music distribution networks in light of this concentration is that to succeed they require the collections of all four of the major record labels. Putting these two features together, the webcasters insist that the record industry operates in a "monopoly" market, and that the statute demands that this Court correct the effects of that monopoly through the rates it sets. Since every market in which the record industry sells sound recording shares these two characteristics, the webcasters are making a sweeping claim: that the entire record industry in all of its dealings is a monopolist.

18. These claims are extraordinary and they are false. Only just recently two of the larger record companies merged. That merger was scrutinized by the Federal Trade Commission. If the FTC had accepted any part of this characterization of the record industry, they most certainly would not have allowed the merger to proceed. But it did *not* accept any part of this characterization, and it did allow the merger to proceed. The webcasters no doubt think this was wrong, and they here are asking this Court to intervene and correct at least one small part of the error committed by the FTC. But, respectfully, nothing in the statute remotely suggests that this is the role of this Court.

19. On the record here it is clear that the webcasters mischaracterize the competitive nature of the record industry markets. For one thing, the factual assertion that the products of all four labels are needed in all music markets is not something established on this record, and it is not true. The webcasters claim otherwise, but their claims are based on clear misrepresentations of record evidence. We address those misrepresentations in this Reply Statement of Facts. For another thing, the webcasters ignore other forms of competition that exist even in situations in which webcasters or other distributors do have contracts with all four major record companies. And, most of all, to repeat, they ignore the facts on the ground, which are that all theories about

market power to one side, the record industry markets are functioning in ways that monopoly markets do not function.

The Webcasters' Benchmark

20. The webcasters' benchmark is designed to eliminate record company market power, and on its own terms it succeeds admirably. The trouble is that it not only eliminates whatever market power the record companies might have as a result of their size or the alleged need for licenses from all four major companies (though not a scintilla of evidence is introduced that this added market power even exists), it also eliminates the market power associated with the value of the copyright itself. By design it treats the copyright holders as if they did *not* own sound recording copyrights, but owned only a far less valuable right in the musical work that is recorded.

21. The webcasters accomplish this result through a three-step process.

22. *First*, through their claims about market definition and market power they insist that the Court should ignore all market evidence that reflects the actual value of the sound recording copyright. The value of sound recordings in the free market ultimately is determined by what consumers are willing to pay for them. So by far the best evidence of the value of sound recordings is evidence of what price the record companies get for their sound recordings in other markets not subject to the statutory license. Indeed, this evidence is irreplaceable. Without it, regulators and judges are left to estimate that consumer value through economic models or theoretical constructs.

23. But the webcasters claim that all of this evidence — interactive webcaster agreements, ringtone agreements, digital download agreements, clip sample agreements, CD sales — is so fatally infected by the record companies' market power that it is worthless. Their claim here is that this entire body of evidence must be completely disregarded.

24. *Second*, free of any marketplace evidence of the value of sound recordings, the webcasters turn to a much less valuable and entirely different copyright as a benchmark. Musical works are different copyrights, used for different purposes, sold by different sellers, and functioning in different markets. Even on their own terms, musical works agreements are not the result of willing buyer/willing seller transactions. Instead they are terms subject to review by an antitrust court. It is difficult to imagine a less relevant benchmark, and it is difficult if not impossible to imagine what adjustments would have to be made to have the rates in these agreements reflect the rates that would result from agreements to sell sound recording licenses in an unregulated marketplace.

25. But notwithstanding that the Librarian in the last proceeding expressly held that the webcasters could not rely on musical works copyrights unless it made such "appropriate adjustments," here the webcasters propose that this benchmark be applied without any adjustments whatsoever. For reasons that again were squarely rejected in the last proceeding, the webcasters insist that the two copyrights have identical value — that is, that customers in the end of the day value a song to the exact same degree that they value a sound recording. At face value that is an incredible proposition. Anyone who walks into a record store and observes that CDs are organized by performer, and not by song title, would find this assertion laughable. But the webcasters' expert has made arguments about this equivalency, arguments that not only were rejected by the CARP, but were made by the same expert in testimony that was literally cut and

pasted from the last proceeding into this one. In SoundExchange's Reply Findings of Fact, we address each of these arguments and show them to be specious.

26. *Finally*, in their third and final step, the webcasters offer what they claim to be empirical proof that their assumption about the equivalency sound recordings and musical works is correct. Here too they borrow directly whole sections from testimony filed and ultimately rejected in the last proceeding. Their claim is that the equivalent value of these two copyrights is shown in the market for music that is played in the background of movies and televisions.

27. Since the goal is to determine the relative value of the two copyrights to customers, reliance on this market is at best an extremely poor choice. The value that customers place on sound recordings, and on musical works, when they are played in the background of a movie is entirely different than the value they place on sound recordings and on musical works when those products are listened to directly. Once again, if anything were to be made of this comparison, adjustments would need to be made. And, once again, the webcasters make no adjustments. The factual underpinnings of all of this is discussed in our Reply Findings of Fact.

28. In defending their comparison to this background music market, the webcasters make a critical admission. They acknowledge that moviegoers care so little about the background performances in the movies they see that they are entirely content to have songs re-recorded by "cover bands." The webcasters embrace this undisputed fact, since, they say, it shows the value of a sound recording in a market in which the sound recording copyright holder has virtually no market power. If the record company drives too hard a bargain, the movie producer will simply go elsewhere. This is a luxury the webcaster does not have — his customers want the original hit recording and will not accept any substitute. So the record

company has far less market power in the background music market than in markets in which sound recordings are being listened to in their own right.

29. But that missing market power has nothing to do with market concentration, HHIs, or the need for all four record labels. It is the market power associated with the unique value of sound recordings themselves when the customer wants to hear a song. In other words, the webcasters have proposed and "proved" a rate that by its very design deprives the record companies of the value of their sound recordings.

30. The proof that this is so is that in every single market in which music is listened to in its own right, rather than as background for movies, a license for the sound recording copyright is many multiples more valuable than the license for musical works. The webcasters do not deny this, but return to where they started: any agreement with the record companies (except, for some unexplained reason, agreements regarding movie background music rights) is tainted by "market power," and so cannot be considered.

31. These arguments were rejected *in toto* last time around, and they should be rejected again. SoundExchange in contrast has introduced a substantial body of evidence relating to how its sound recording copyrights are valued in the real world. It would be folly to dismiss this evidence out of hand as the webcasters urge. SoundExchange's benchmark analysis meets all of the requirements established by previous tribunals: in its benchmark market, the buyers are the same buyers as in the target market, the sellers the same sellers, and the copyright the same copyright. The differences between the benchmark and the target market are clearly identified, and adjustments are made to address those differences.

32. When the Court does consider the record evidence and the way it informs SoundExchange's economic analysis, it should conclude that SoundExchange has proposed a royalty rate that most fairly fulfills the Court's statutory obligation to set a rate that corresponds to the rates that would be negotiated between a willing buyer and a willing seller.

I. THE WEBCASTERS' BENCHMARK ANALYSIS

A. The Webcasters Thoroughly Distort the Statutory "Willing Buyer"/"Willing Seller" Standard.

1. Overview

33. The webcasters explain and defend their economic case in the Joint Proposed Findings of Fact and Conclusions of Law of DiMA and the Radio Broadcasters ("Joint DiMA/Br. PFF"). These proposed findings are then incorporated by reference in the separate filings of other webcasters and webcaster groups. We address those core proposed findings here.

34. The webcasters' core economic "findings of fact" relate to the appropriate market definition, the relevance of benchmarks, their defense of their own benchmark, and their attack on SoundExchange's benchmark. Those findings consist largely of policy arguments rather than factual assertions. Many of their factual claims are *not* supported by record evidence, or are irrelevant to the claims that they purportedly support.

35. Specifically, the webcasters' "factual findings" return over and again to a series of related policy claims that for the most part have already been rejected by prior tribunals:

36. First, the webcasters argue that as a matter of law the "willing buyer/willing seller" standard should be construed to require a "reasonable" rate and not simply a rate negotiated in a "free market." In their view, *no* rate negotiated by sound recording copyright

owners can be a "reasonable" rate. Joint DiMA/Br. PFF ¶ 20; Joint DiMA/Br. Conc. ¶¶ 29-37. We offer our response in the Conclusions of Law section *infra*.

37. The webcasters next argue, as a matter of fact, that in every market in which the record companies are sellers which is discussed on the record in this case, the record companies have market power. They point to the fact that the record industry is, in their view, highly concentrated, and that, in their view, the buyers require sound recordings from all four major record labels. As a consequence, all contracts that involve record companies in any market addressed in this case (webcasting, digital downloads, ringtones, and clip samples) are invalid benchmarks because the record companies have "too much" market power in all markets in which they operate. All data derived from real world markets in which record companies participate is similarly tainted.[2] Joint DiMA/Br. PFF ¶¶ 24, 56-62.

38. On that basis the webcasters reject Dr. Pelcovits's benchmark analysis and Dr. Brynjolfsson's surplus analysis. Both of these analyses, they correctly observe, involve data drawn from the real world in which the record companies operate. The webcasters claim that real-world data fatally infects both analyses. Joint DiMA/Br. PFF ¶¶ 81-104, 173.

39. Next, the webcasters argue that the best possible benchmark market compatible with their view of the governing legal standard is one in which regulators have artificially eliminated market power in setting a rate. Since there are no such markets involving record companies, the best that can be done is to rely on contracts in which musical works copyright holders enter into agreements subject to an antitrust decree requiring that those rates be

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[2] Dr. Jaffe, testifying on behalf of DiMA, has never articulated a standard for what constitutes "too much" market power. Jaffe Reb. Test. at 12-14. In his view, apparently market power is like obscenity — he cannot define it but he knows it when he sees it.

"reasonable." Joint DiMA/Br. PFF ¶¶ 25-27. If this Court rejects the webcasters' claim that all music markets are tainted because the record companies allegedly possess too much market power, the webcasters' economist concedes that his musical works benchmark would have to be adjusted in a manner he has not attempted. Jaffe Reb. Test. at 140.

40. As to the musical works markets, the webcasters insist that there are no relevant differences between the markets for sound recordings and the markets for musical works, so that the rates in the benchmark musical works market can be simply carried over without adjustment into the target market of sound recordings. Joint DiMA/Br. PFF ¶¶ 27-32.

41. Proof of this fact is said to be found in the market for music that plays in the background of movies and television shows. The webcasters reject evidence from other more closely related markets in which music is featured, because the webcasters claim that these markets are infected by record company market power. Joint DiMA/Br. PFF ¶¶ 33-40.

42. In what follows we address the factual claims the webcasters make in support of each of these propositions. We also underscore a point that the webcasters studiously ignore throughout their findings, which is this:

43. The value of sound recordings, relative to the value of musical works, and in absolute terms, in the end is a product of consumers' *demand for sound recordings*. Pelcovits Dir. Test. I at 43-44. The record companies receive what they receive for a sound recording in the open market because customers highly value that sound recording, and because it is to a great degree *not* substitutable for anything else. The record companies capture that value in functioning real-world markets because Congress granted copyrights in the sound recordings. It

is *that* value that is captured in the real-world pricing that the webcasters are urging this Court to ignore, based on a misconstruction of the statutory standard.

2. The Webcasters' Theory That the Record Companies Exercise Monopoly Power Applies to All Music Markets; Accepting That Theory Would Require This Court to Reject All Evidence of Actual Market Transactions in All Music Markets and Find Malfeasance By the FTC in Permitting the SONY/BMG Merger.

44. Based on their misconstruction of the willing buyer/willing seller standard, the webcasters argue that the Court must reject all benchmark and economic analysis based on the real-world conduct of the record companies and digital music services, because although those transaction occur in functioning free markets, those markets are not sufficiently competitive, and so would not yield what the webcasters call "reasonable" rates. Joint DiMA/Br. PFF ¶ 26. In the webcasters' opinion, regulated markets, such as the market for musical works subject to the oversight of the antitrust courts, provide more reliable benchmarks under their construction of the willing buyer/willing seller standard. *Id.* ¶ 25. As SoundExchange discusses in its Proposed Conclusions of Law and Reply Proposed Conclusions of Law, webcasters' argument is foreclosed as a matter of law, and it is also utterly inconsistent with the record.

45. The webcasters do not dispute that all of the markets in which the record companies operate in the real world are functioning — there is no dispute that artists are creating sound recordings, and that those sound recordings are being purchased through many different distribution networks that profitably operate and sell those sound recordings to hundreds of millions of customers, who pay the retail price that results from the operation of these markets. Jaffe Dir. Test. at 100-01; Pelcovits WRT at 2. In other words, the real-world markets in which the record companies participate are "workably competitive." Pelcovits Dir. Test. II at 133-34. Instead, it is the webcasters' claim that these markets are not "perfectly competitive," and that

this Court is charged with the task of hypothesizing an almost perfectly competitive market (at least, a market in which the *sellers* are subject to perfect competition). Jaffe Dir. Test. at 96 (agreeing that perfect competition means, among other things, that sellers have no market power), 98 (stating that when he refers to a 'competitive marketplace,' he means one in which there is "no significant market power on the part of the sellers.").

46. The webcasters' claim that the record companies have "market power" is structural in nature. The claim is that most of the sound recording copyrights are held by one of four companies, that as a practical matter blanket licenses from all four companies are needed to operate a webcasting service, and that for that reason any of the companies could hold out, giving each of the four major record companies "monopoly power." Joint DiMA/Br. PFF ¶ 81-82. Thus, the two principal elements of the webcasters' "market power" claim are that the record industry is concentrated, and that distributors of sound recordings need sound recordings from all four major record companies to operate successfully.

47. These two conditions are said to apply in virtually every market about which the record companies introduced evidence: the interactive music service markets, Joint DiMA/Br. PFF ¶¶ 91-103, the digital download markets, *id.* ¶ 57, the ringtone markets, *id.* ¶ 58, and the music video markets. *Id.* ¶ 61. And, presumably, these conditions would apply in all other markets in which the record companies participate as well. For example, Dr. Jaffe testified that record stores also need CDs from all four major companies. Jaffe Reb. Test. at 131. The "problem" the webcasters claimed to have identified "tars" the entire record industry. The only inference that can be drawn from this argument is that the entire record industry operates as a "monopolist" in violation of the antitrust laws, and that it is this Court's duty to correct at least one small part of this massive illegal enterprise.

48. The webcasters have produced no evidence to suggest a violation of the antitrust laws that infects the entire sound recording market, and indeed the evidence in the record flatly contradicts it. The webcasters' argument flies in the fact of the fact that the FTC recently permitted the merger of Sony and BMG. Pelcovits Dir. Test. at 143. Although the webcasters argue that the FTC made no express finding regarding competition in the market for the sale of sound recordings, Jaffe WRT at 14, they cannot deny two critical facts. First, the FTC scrutinized the proposed SONY/BMG merger. Pelcovits Dir. Test. at 143. Second, by taking no action, the FTC permitted that merger to occur. *Id.* There is only one conclusion that can be drawn: the FTC did not see the market the same way the webcasters do.

49. The webcasters also try to distinguish the FTC's decision regarding the SONY/BMG merger by asserting that the FTC did not expressly examine the market for interactive music services or the market for webcasting services. Jaffe WRT at 15. But that ignores the fact that the market concentration which the webcasters decry is the same for *all* music markets. And it equally ignores, as we point out above, that the webcasters' theory that monopoly power flows from the need to purchase the sound recordings of all four major record companies would, according to the webcasters, be true in *every* music market. In short, the webcasters want this Court to trim the bargaining power that exists for the record companies in the real world despite the facts that the governing statute requires only "willing buyers" and "willing sellers" rather than a perfectly competitive marketplace, and despite the fact that the FTC has not given any credence to the webcasters' theories.

3. The Webcasters' Theory That the Record Companies Exercise Monopoly Power is at Best Unsupported by the Record.

50. While the Court should reject as a matter of law the webcasters' arguments about the meaning of the willing buyer/willing seller standard, it is also the case that the record evidence does not support either aspect of the webcasters' claim that the record industry has monopoly bargaining power. Joint DiMA/Br. PFF ¶¶ 91-130.

a. Concentration in the Record Industry

51. Dr. Jaffe performed an HHI analysis and concluded that the record industry is "highly concentrated." Joint DiMA/Br. PFF ¶ 108. But he agreed that this fact is hardly dispositive, and that the FTC has permitted mergers in industries with a far higher concentration — most recently, permitting the Sprint/Nextel merger notwithstanding an HHI of 3,300. Jaffe Reb. Test. at 107-109.

52. Moreover, as Dr. Jaffe acknowledges, an HHI calculation is a tool developed by federal antitrust authorities to help them assess the competitive implications of mergers and market consolidation. Jaffe Reb. Test. at 35-36, 108. Yet the same antitrust officials who developed the HHI methodology recently applied it in the recording industry and permitted the SONY/BMG merger. Pelcovits Dir. Test. II at 143. The Court need not give market consolidation and HHI's more weight than did the FTC.

b. The Webcasters' Alleged Need for Blanket Licenses from All Four Major Record Companies

53. The webcasters claim that the markets for sound recordings are not competitive because buyers are unable to avoid any of the four major record companies and purchase a "competing, substitutable product." Joint DiMA/Br. PFF ¶ 93. Instead, the webcasters claim

that they need licenses from all four of the major record companies, allowing any one of the companies to hold up a sale and so exercise monopoly power. For at least three reasons, this is wrong.

54. *First,* the record evidence as to whether webcasters need blanket licenses from the four major record labels to operate successfully is ambiguous, but the weight of the evidence is that they do not. Dr. Jaffe's written testimony states that the webcasters need all four sets of licenses, but when he was asked the basis of his understanding on this point, he stated that "I thought there was testimony on that, but as I sit here today I really don't remember." Jaffe Reb. Test. at 119-120. Dr. Pelcovits and Dr. Brynjolfsson each testified that licenses from all four of the "majors" were not needed. Brynjolfsson Reb. Test. at 128-29; Pelcovits Dir. Test. I at 119. The webcasters' claims to the contrary concerning Dr. Pelcovits, Joint DiMA/Br. PFF ¶ 94, misrepresents his testimony. It was the webcasters' attorney, and not Dr. Pelcovits, who stated that his client "must have a license from each of the big four record companies." Pelcovits Dir. Test. I at 118-119. And at page 119 of that transcript, Dr. Pelcovits did not testify that the webcasters must have licenses from all of the majors. He testified to the quite different point that they *do* have such licenses. *Id.*

55. The testimony of the witnesses in the industry, which is the most reliable testimony on this point, fell well short of a consistent view that all four licenses were required. Sony's Mark Eisenberg testified that "[m]ajor download services" would be "at a disadvantage" if they did not offer recordings from all four major's catalogs. Eisenberg Reb. Test. at 90, 92. Lawrence Kenswil made a similar qualified statement with respect to statutory webcasting services. Kenswil Dir. Test. at 71. Robert Roback indicated that he believes Yahoo! needs licenses from all four record companies, Roback Dir. Test. at 314-15, 377, but also agreed that

Yahoo! operated for two years without UMG content for its custom radio channels. Roback Dir. Test. at 378-79; Roback Reb. Test. at 17, 36-38.

56. *Second*, even if the buyers in the webcasting or interactive music services market needed the catalogues of all four companies, it does not follow that each company exercises monopoly power. Other forms of competition still could and do discipline the market. The record companies get paid based on the number of their sound recordings that are played by a webcaster. Jaffe Reb. Test. at 114-16. A record company that sells its sound recordings at a lower per play rate would therefore have an advantage in the marketplace and might as a result garner more plays and higher revenue. Both Dr. Jaffe and Dr. Brynjolfsson agreed that such competition was possible. Jaffe Dir. Test. at 117 (testifying that a record company "could" compete to gets its music played by offering a lower rate for the license); Brynjolfsson Reb. Test. at 29.

57. Indeed, in their findings of fact DiMA and the Broadcasters acknowledged precisely this form of competition, asserting that Yahoo! entered into a flat-rate pricing deal with Universal that created "an incentive [on Yahoo!'s part] to play more Universal music and drive down the effective rate as it grows its listenership." Joint DiMA/Br. PFF ¶ 269. Moreover, Mr. Bryan testified that record companies do compete for placement and play on all of these services, including interactive services, because more play means more royalties. Bryan Dir. Test. at 166.

58. *Third*, there is *no* record evidence concerning the extent to which this need for all four— if such a need exists — increases the bargaining power of the record companies. Dr. Jaffe, who testified why this fact, if established, would tend to increase bargaining power to

some degree, Jaffe Reb. Test at 17-18, does not attempt to quantify the degree, or to point to real-world evidence to quantify the influence of this market power.

59. In their findings of fact, the webcasters assert that the need for all four sets of licenses significantly enhances the record companies' bargaining power. Joint DiMA/Br. PFF ¶ 104. But they cite to no record evidence on this point. The only statement to which they point is one by Dr. Jaffe drawing a distinction, in theory, between the market power associated with a single copyright and the market power associated with the concentration in the record industry. Jaffe Reb. Test. at 17-18. But that statement does not address whether or the extent to which one or the other of those causes of market power is significant, and neither there nor anywhere else does Dr. Jaffe or any other witness claim that there is a "significant difference" in the record companies' market power as a result of the fact that the webcasters allegedly need blanket licenses from all four major record companies.

60. The webcasters concede, as they must, that the legal standard does not require or permit the Court to strip the record companies of the market power associated with the copyright in the individual sound recordings themselves. Jaffe Reb. Test. at 17, 100-01. The webcasters, however, have made no effort to separate out the market power which they believe the Court should be tasked with eliminating, and the market power that they do not deny the record companies are entitled to retain — the market power of sound recordings, preserved by the copyright laws. That is the webcasters' burden, and they have failed to meet it.

61. There is, however, record evidence of distributors who operate successfully without all, or even any, licenses from the four major record companies: the ringtones market, Eisenberg Reb. Test. 228, and the market for digital downloads, *id.* 90, where the second largest

market participant has licenses with *none* of the four major record companies. Brynjolfsson Reb. Test. at 136 (discussing eMusic). This evidence shows that the sound recording copyright holders obtain a substantial share of revenue associated with the sale of their works in these markets even in the absence of the allegedly enhanced market power that comes from owning a large portfolio of sound recordings. Bryan WDT at 22; Bryan Dir. Test. at 83; Eisenberg Dir. Test. at 90; Kenswil Dir. Test. at 57-58; Kenswil WDT at 21. It therefore supports the conclusion that whatever enhancement to the record companies' bargaining power would accrue should a distributor need all four label's sound recordings, that enhancement may be negligible in light of the significant market power associated with a single sound recording copyright standing on its own.

4. The Webcasters Persistently Focus on the Alleged Market Power of Sellers and Studiously Ignore the Market Power of the Buyers.

62. While the webcasters argue that all record company contracts and other evidence of market behavior because they are tainted by market power, at the same time, in the webcasters' view, the buyers remain the real world buyers of sound recordings, regardless of what market power *they* have.

63. And they have considerable market power. In response to a question from the Court about whether Yahoo! would be one of the handful of "large players" that copyright owners who want to generate revenue from Internet services "would have to have," Robert Roback readily responded: "Absolutely." Roback Dir. Test. at 388. Consistent with that view, an internal Yahoo! document notes that increasing Yahoo!'s growth or "scale" enables it to obtain "[b]etter, lower cost content from labels." SX Trial Ex. 32.

64. Thus, in the "reasonable" hypothetical world they wish the Court to construct to eliminate all vestiges of market power, the webcasters would define the hypothetical seller as the owner of a single copyright, who would have to negotiate royalty rates against some of the largest multibillion dollar corporations on the globe. Griffin WDT at 56; Brynjolfsson WRT at 29-30. That is not a view of the hypothetical market this Court should adopt, nor the view of the market that was adopted by the Librarian and the Webcaster I CARP. Webcaster I CARP Report at 59-60.

65. In the absence of evidence of market failure, or a statutory mandate that expressly calls for departure from market-based ratemaking, the Court should reject this view of its role and of the willing buyer/willing seller standard.

B. The Webcasters' Reliance on the Market for Musical Works as a Benchmark, Previously Rejected by the CARP, Should Be Rejected Again.

66. Having taking the position that no market transactions involving the record companies can be appropriate benchmarks, the webcasters acknowledge that the benchmark they rely on instead cannot involve the same underlying performance right, Joint DiMA/Br. PFF ¶ 34, the same sellers, or the same market. *Id.* Instead, they propose as a benchmark the royalties collected by musical works copyright holders from webcasters, and claim that that benchmark can be applied directly to the target market without any adjustment.[3] *Id.*

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[3] DiMA and the Broadcasters significantly misrepresent the testimony of SoundExchange's John Simson concerning ASCAP and BMI rates. Joint DiMA/Br. PFF ¶ 25. In response to questioning, Mr. Simson agreed that the ASCAP and BMI rate courts *have jurisdiction* to set a "reasonable rate" when there are disputes. Simson Dir. Test. I at 322. He certainly did not express the belief that the actual rates currently established are "reasonable" given the current market conditions. Nor did Mr. Simson testify that, as the webcasters allege, that the federal courts administering the ASCAP/BMI content decree play "an analogous role" to the Court in these proceedings, as the webcasters inaccurately quote him. Instead, he particularly said that he

1. The Webcasters Wrongly Claim That the Musical Works and Sound Recording Markets "Can Be Presumed to Be Identical."

67. The webcasters assert that the musical works benchmark can be applied without any adjustment to the sound recording markets because the two markets "can be presumed to be identical." Joint DiMA/Br. PFF ¶ 27. This is apparently intended to be a conclusion derived from facts marshaled in their Findings of Facts. But the factual claims upon which they rely do not support the conclusion even if, as is often not the case, they were supported by the record.

68. The webcasters first argue that that buyers in the webcasting market value both copyrights equally because both are needed by the webcasters, in the sense that without both copyrights, the webcasters cannot engage in webcasting. Joint DiMA/Br. PFF ¶¶ 28, 34. But whether the copyright work is "essential" tells one nothing about the rates that would be negotiated in the free market. It is also true that a great many other inputs are equally essential — for example, Internet access (bandwidth), employees, and staplers. *See, e.g.*, Jaffe Dir. Test. at 24 ("without bandwidth, there is no webcasting"); Brynjolfsson WRT at 8. The webcasters do not suggest that the prices for all of these inputs therefore should be "presumed to be identical."

69. From the perspective of the sellers, the webcasters contend that the sellers of musical works and the sellers of sound recordings are similarly situated because the costs of production for both are "sunk" or, at least, irrelevant because the royalties associated with webcasting are just not significant enough to care about. This is untrue, for the reasons explained *infra* at I.B.2.b.

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had never been in an ASCAP/BMI rate proceeding, so he could not say with certainty. Simson Dir. Test. I at 323.

70. The webcasters go astray again, with respect to costs, when they state that "there is no marginal cost to provide [sound recordings] to the webcaster," and therefore that "no incremental costs flow from the decision to license." Joint DiMA/Br. PFF ¶ 34. It is a feature of virtually *all* intellectual property that the incremental or marginal cost of producing an additional copy is little or nothing. If market value turned on that fact, virtually all intellectual property would be worth nothing. That is why the Founders created, and Congress expanded, copyrights, to allow creators to extract value from property where there is no incremental cost associated with its exploitation. Notably, Dr. Jaffe never claims that this fact standing alone has any relevance.

71. Consequently, the webcasters' assertions that the market value of the sound recording as a theoretical matter ought to be equal to the market value of a musical work is not supported by the record evidence or sound economic theory, and it should be rejected, as it was rejected in the prior proceeding.

2. The Webcasters' Reliance on the Market for Synch Rights to Establish Empirically That the Musical Works and Sound Recording Copyrights Have the Same Value Is Unjustified.

a. Sound Recordings Are Valued Very Differently in Markets for the Sale of Music, Compared to the Synch Rights Market.

72. As just established, there are no sound theoretical predicates for the webcasters' claim that sound recording and musical works markets ought to be "equal." The webcasters nevertheless assert that they have empirical evidence to support that claim, derived from the market for synch and master use rights for music played in the background of movies and television shows.

73. Relying on what they acknowledge to be five-year-old data cut and pasted from the previous proceeding, Joint DiMA/Br. PFF ¶ 35, the webcasters point out that there are cases in which sound recording copyright holders obtain the same price for their license as musical work copyright holders, when recordings are used as background for movies and television shows. *Id.* In this proceeding, the sole licenses that webcasters introduced into the record were a smattering of master use licenses that show that sound recording copyright owner receive *at least as much* as music publishers, not the other way around. *See* Services Exs. R-56-60.

74. However, the webcasters do not address any of the uncontested record facts establishing the relevant differences between the market for background music for movies and the webcasting market. These uncontested facts establish that even if one assumes that the two copyrights fetch the same price when music is used as background for movies, that shows nothing about what the relative price would be in the webcasting market if that market were characterized by willing buyer/willing seller transactions.

75. Although there are many differences between the market for the licensing of music in movies and television productions and the market for the licensing of music for statutory webcasting, *see* SX PFF ¶¶ 497-528, below we highlight two in particular.

76. *First,* and by far the most significant, the webcasters do not dispute that value ultimately derives from customer demand, and that the role music plays when a customer watches a movie is entirely different than the role music plays when a customer listens to a webcast. Obviously, customers value sound recordings far less when they hear them as background when they go to a movie than they do when they choose to listen to sound recordings offered by a webcaster. Pelcovits WRT at 5; Rowland WRT at 4. The webcasters do

not deny that the value to the customer of sound recordings in those two settings is entirely different. And the uncontested evidence on the record is that *because* sound recordings have so much less value in this context, bargaining in this market is different than in markets in which sound recordings are the principal product. *See, e.g.,* Brynjolfsson Reb. Test. at 55-57; Brynjolfsson WRT at 13-14; Eisenberg WRT at 4-6; *see also* Rowland WRT at 3-7; Pelcovits Reb. Test. at 49-51.

77. *Every single witness* who testified in this case and who has any knowledge of the market for master use and synch rights licensing described differences between that market and the market for webcasting. Rowland WRT at 1; Rowland Dir. Test. at 130-33; Eisenberg WRT at 4; Ulman Dir. Test. at 23, 33. *Not one witness* testified that the two markets are similar.

78. UMG witness Tom Rowland made clear that because the movie and television producers are using music primarily as background, they can easily substitute one sound recording for another, re-record a musical work using a sound-alike cover band or even the original artist, or use production music. That fact directly decreases the value of the sound recording relative to the value of the musical work. Eisenberg WRT at 4-6; Rowland WRT at 3-7; Rowland Dir. Test. at 138-42, 148-53. And regardless of whether the producers actually use these substitutes, the fact that they have that option significantly lowers the relative rates for the use of sound recordings in movies and television productions. Rowland Reb. Test. at 148-49 (regardless of whether a producer actually uses a substitute, the existence of that possibility "entirely affects our negotiations because the threat of a re-record is always present as part of the negotiation.").

79. Precisely because of this difference, if sound recording copyright holders demand too high a price for a particular sound recording of a song a movie producer wants, it is a simple matter for the producer to re-record the song with a "cover" band. Jaffe Dir. Test. at 97. No such substitution is possible in webcasting. *See* Pelcovits WRT at 5 (explaining that a movie producer can use a sound recording that sounds like the Beatles, but a webcaster cannot); Rowland WRT at 4.

80. Even DiMA's witness, Karen Ulman, testified that "if you wanted to use a song that was number one that week on the Billboard charts . . . you would be very limited in your ability to negotiate at all." Ulman Dir. Test. at 23. On the other hand, she continued, if you just want to use a sound recording as background for a dance scene in a movie, you can use a "standard song," you will have "numerous recordings available," and "that will affect how much you pay." *Id.* Of course, the "song that was number one that week on the Billboard charts" is precisely what the webcasters need. Evidence from AOL, for example, demonstrates that the AOL Radio channels most listened to by consumers focus on the top-rated songs in each genre: Top Country (ranked no. 2); XM Top Tracks (ranked no. 9); Top Jams (ranked no. 10); Top Hip Hop (ranked number 13; Top R&B (ranked no 15); Top Alternative (ranked no. 16). *See* Winston Reb. Ex. 4. In the case of digital music services, therefore, music is central to the business and there is far less ability to substitute for a popular sound recording. Movie music is an entirely different matter.

81. Remarkably, not only did Dr. Jaffe not adjust for this difference between the markets, he appears to have paid it no attention whatsoever. Jaffe Dir. Test. at 99.

82. The webcasters acknowledge that this establishes that the record companies have bargaining power in the webcasting market that they do not have in the movie market. Joint DiMA/Br. PFF ¶ 39. They assert, however, that absence of this market power "is precisely why the movie/TV data provides such relevant evidence." *Id.* That statement betrays a remarkable misunderstanding of the marketplace and the legal standard that governs this case — even on the webcaster's peculiar view of that standard. The reason the owners of sound recordings have relatively more bargaining power in the webcasting market is that consumers who listen to webcasting services will not patronize a webcasting service that streams only production music and cover bands. Pelcovits WRT at 5. They want the real thing — the popular artists and recordings. Movie and television producers can substitute for those popular artists and sound recordings, because they usually need only background music, but webcasters cannot. Jaffe Dir. Test. 93, 97-98. It is precisely the purpose of copyright law to allow the copyright owners to reap the benefit of their popularity; even Dr. Jaffe gives lip service to the notion that the copyright owners should not be stripped of the value of the copyright. Jaffe Reb. Test. at 100-01. The webcasters' admission that the movie and television market offers buyers a far greater ability to substitute for sound recordings dooms their argument that the movie and television market establishes the equivalence of sound recording and musical works rights.

83. Indeed, it does more than that. The webcasters' reliance on synch and master use rights underscores a principal defect in their case — that the webcasters seek to deprive the record companies the value to which the record companies are entitled, and which they obtain in the real world. That value is derived from the value the consumer places on individual sound recordings. The market power that the webcasters' strip from the record companies when they claim their analysis is "empirically verified" through this synch rights comparison has nothing to

do with market concentration or needing all four record libraries. It has to do directly with the market power associated with the ownership of a copyright. And all of this underscores the critical importance of the admission Dr. Jaffe made at the hearing: that in the real world, in contrast to the hypothetical world of his model, sound recording copyright holders would obtain far more for their product than Dr. Jaffe's "reasonable" royalty. Jaffe Reb. Test. at 214-15.

b. Cost in the Synch Rights Market Are Sunk; Costs in the Target Market Are Not.

84. Further distinguishing the synch rights/master use market from the webcasting market is that the costs of making sound recordings in the former market are sunk and in the latter market they are not. Dr. Jaffe, in fact, analyzed only license transactions in the synch rights/master use market for sound recordings already in existence (and production costs by definition were already expended), excluding from his analysis any music created for the movie or television production. In contrast, even Dr. Jaffe recognizes that in the target market, new sound recordings will be produced continuously over the term of the statutory license. Jaffe Dir. Test. at 100-01; Jaffe Reb. Test. at 203.

85. Not only will new sound recordings be produced and used in the webcasting market over the terms of the statutory license, but those new sound recordings will represent a substantial percentage of the revenues the record companies will earn during the license term. Pelcovits WRT at 2; SX Ex. 24 RR at 5.

86. SoundExchange witnesses, most notably Charles Ciongoli, testified without contradiction that the record companies expend significant sums to find new artists, and to create and market new sound recordings. These costs are not matched by songwriters or music publishers, who have almost non-existent production costs and who do not expend significant

resources to market and promote either the musical work or the sound recording of which it is an input. Ciongoli WRT at 2-4; Ciongoli Reb. Test. at 12-33.

87. The webcasters' make a half-hearted attempt to claim that the sound recording costs in the webcasting market also are sunk, Joint DiMA/Br. PFF ¶ 29, but almost as quickly as the webcasters make this claim in their findings of fact, they appear to abandon it. They acknowledge that "the term of the statutory royalty to be set in this proceeding obviously will cover the digital transmission of sound recordings that have not yet been created." *Id.* ¶ 31. They then fall back to the claim that although these costs are not sunk, "such costs are properly analyzed in the same manner as 'sunk costs.'" *Id.* ¶ 31 n.5.

88. In particular, the webcasters argue that the sound recording rights owners currently derive little revenue from webcasting, and such revenue as they receive will not affect their investment decision. *Id.* Thus, according to Dr. Jaffe, the extraordinary differences in cost and risk in the markets associated with the sound recording and musical works copyrights are irrelevant. *See* Joint DiMA/Br. PFF ¶ 30.[4] In other words, Dr. Jaffe proposes a "willing buyer, indifferent seller" standard. *Id.*

89. It is true that the record companies currently obtain relatively little revenue from webcasters. That is a result of the fact that the webcasting industry was historically quite small, and a result of the fact that the current royalty is so low. But it is of course the very purpose of

[4] *See also id.* ¶ 53 (it is only the record companies' direct investment in webcasting market that matters, and the record companies have no need or desire to recover through webcasting royalties costs associated with producing and promoting sound recordings generally). Neither Dr. Brynjolfsson nor anyone else ever testified that SoundExchange should recover from webcasters costs associated uniquely with the sale of CD's. *Compare id.* ¶ 54. What he testified is that the substantial common costs, risks, and investments associated with sound recordings should be recovered in all sound recording markets.

this proceeding to determine the appropriate royalty. Assuming that the rate should remain so low as to be insignificant, and then using that proposition as an argument to support a continued low royalty rate, is circular reasoning.

90. Moreover, neither Dr. Jaffe, nor any other witness, makes the claim that *in the future* revenues from digital distribution of the record companies' copyrighted material will remain insignificant. That — and not historical revenue — is the relevant factual question. Indeed, webcasters go to some lengths to emphasize the rapid growth of digital music services and the revenues that record companies derive from them. As described in more detail *infra*, the *undisputed* record evidence is that the record companies increasingly will depend on receiving revenue from a wide variety of distribution outlets, and that in the future CD sales will no longer account for the vast majority of the record industry's revenue. Bryan WDT at 2 (testifying that while physical sales are declining, digital distribution is "the key to new growth in the record industry in the coming years"); Bryan Dir. Test. at 10; Eisenberg Dir. Test. at 14; Kenswil WDT at 2.

91. But that record also compels rejection of Dr. Jaffe's claim that webcasting revenue is irrelevant. Dr. Jaffe concedes that record companies would seek to recover their costs and seek a market rate for digital downloads, Jaffe WDTR at 24, but that market did not even exist in any significant way until 2003. Nor did the mastertone market, which is now a multibillion dollar market. Bryan Dir. Test. at 37. To say that, because today webcasting is small portion of record company revenues, record companies would be willing to accept anything that a webcaster might offer ignores the fact that these markets are changing rapidly, that record companies now seek to maximize revenues from every revenue stream, and that, within a few years, ad-supported webcasting may be an enormous market. Indeed, Mr. Roback

from Yahoo! testified that he believes ad-supported webcasting — which is making inroads into the multiple billion dollar market for radio advertising — is a "bigger market opportunity" than digital downloads, both for digital music services and for record companies. Roback Reb. Test. at 140-43.

92. Indeed, the record evidence is that on-demand services and music video streaming are also small portions of record companies' revenues but that does not stop record companies from seeking and receiving significant revenues from those services as well in the free market. *See* SX PFF Section V(C); Services Ex. 145 (showing that video streaming earned revenue of approximately [REDACTED] in 2005 for UMG).

93. Finally, and perhaps most importantly when it comes to the record companies' alleged indifference, the webcasters ignore the effects of webcasting royalty revenues on the artists and marginal indie labels. Simon Wheeler, for example, testified on behalf of a small indie label that "there's going to be a lot of small revenue streams coming through and each one is going to be vitally important if you're going to exist as a music or entertainment company in the future." Wheeler Reb. Test. at 234. Dr. Jaffe gave this no thought at all. He did not even know what share of the sound recording royalties generated by webcasting is paid to the artists. Jaffe Reb. Test at 205-06.

94. In response to this same argument about sunk or otherwise irrelevant costs made five years ago by Dr. Jaffe, the CARP expressly rejected the view "that sound recording owners have a static perspective and do not consider the costs of developing new sound recordings when negotiating fees." Webcaster I CARP Report at 41. This Court should do the same.

c. Other Markets, Far More Relevant Than the Synch Rights Market, Demonstrate That Sound Recordings Are More Valuable.

95. The webcasters do not dispute that in every market in which what customers value is the sound recording itself, and not a movie using the sound recording as background, the sound recording copyright is worth many times more than the musical works copyright. Joint DiMA/Br. PFF ¶¶ 56-64. Indeed, Yahoo!'s own documents show precisely what Yahoo! pays to music publishers and to sound recording copyright owners with respect to different digital music services — showing both [REDACTED] SX Tr. Ex. 158 at CRB-YAH-R-000044.

96. The obvious reason for this difference is one Dr. Jaffe did not even consider. When Dr. Jaffe was asked whether it was possible that the differences between the value of the sound recording copyright and the musical works copyright in virtually every market could be explained simply by the fact that sound recordings are more valuable to consumers than musical works, his answer was this: "I haven't thought about that." Jaffe Reb. Test at 236.

97. Instead of recognizing the obvious, the webcasters make two arguments about why the Court should ignore this evidence from markets that are far more similar to the target market than the market for background music for movies. First, they claim (as they do any time the record companies attempt to rely on their own real-world market experience) that the sellers have excessive market power. Second, they argue that the musical works rate is constrained, either by the Rate Court or by statutorily determined royalty rates.

98. First, the webcasters repeat their general argument that *any* contract with a record company is automatically irrelevant because the record companies have market power. Joint DiMA/Br. PFF ¶ 57-62. Not only is this argument foreclosed by the governing legal standard,

but the webcasters introduce no evidence concerning any of these markets that would show that it is industry concentration or the need for licenses from all four major record companies, that explains the differing value of the two copyrights in the two different markets. As demonstrated in the previous section, the weight of the record evidence is that the difference reflects the market power the record companies have as a result of the strength of individual copyrights.

99. Moreover, the webcasters' "market power" arguments are particularly unpersuasive in this context. In the market for digital downloads, for example, the oft-repeated refrain that the sellers possess monopoly power because the buyers need to license the catalogues of all four major record companies, *see* Joint DiMA/Br. PFF ¶ 57, is simply not true. No SoundExchange witness so testified. Mr. Eisenberg's referenced testimony was far more nuanced — that "if you are pitching yourself as the be all and end all, then you would be at a disadvantage," without music from all four libraries. Eisenberg Reb. Test. at 91. And, to the contrary, Dr. Brynjolfsson testified that the second largest download service in the nation operates without having a license from all four majors. Brynjolfsson Reb. Test. at 136.

100. The second reason the webcasters give for claiming that music company contracts in related markets are "irrelevant" in making a comparison with the musical works royalty rates is that the latter are "subject to ASCAP and BMI consent decrees and rate-court supervision, while the fees charged by sound recording owners are unconstrained." Joint DiMA/Br. PFF ¶¶ 59, 60, 62. But the webcasters' principal argument is that these "constrained" ASCAP/BMI rates are the gold standard and "can be presumed to be reasonable." *Id.* ¶ 25. Indeed, they go so far as to say these musical work rates "are likely to be somewhat higher than those that would prevail in a truly competitive market." *Id.* ¶ 77. The webcasters may not argue that analogies to the musical works royalties are "perfect" analogies because the rates are policed by the antitrust

court when it suits their purposes, and then turn around ten pages later and argue that such analogies are unfair for precisely the same reason, when it does not suit their purposes.

101. In addition to these general points, the webcasters make additional points about particular markets. These points lack factual support. The ringtone market, for example, cannot be explained away by the webcasters. As to the sellers' supposed market power, the undisputed record evidence is that ringtone and mastertone providers do not require the catalogs of all four majors. Although the webcasters misrepresent Mr. Eisenberg as testifying that "compelling services effectively need to secure the rights to the catalogs of all four major labels," he said no such thing. His testimony was that he was aware of an active service selling ringtones that was operating without Sony-BMG sound recordings. Eisenberg Reb. Test at 228.

102. As to alleged constraints on the musical works rate, Mr. Eisenberg's testimony, which was uncontradicted, was that the ringtone market provided a particular useful example of the different value of musical works and sound recording copyrights, precisely because there music publishers were first to the market and there were no corresponding sound recording rights to be negotiated. Eisenberg Reb. Test. at 230.

103. As Mr. Eisenberg explained, the publishers were the first to enter the market, and they did so at a time in which they had the only relevant copyright, because the ringtones were "polyphonic ringtones" made up of "beeps" playing a tune, and so did not involve sound recordings. Eisenberg Reb. Test. at 20-22, 230. The publishers in the open market negotiated a 10% rate free of any regulatory compulsion. *Id.*

104. Only later, when cellphones evolved to the point where they could play sound recordings, and the record companies began negotiating deals for sound recording rights, did

record companies raise the possibility that a Section 115 mechanical license might govern the rate paid for musical works. Eisenberg Reb. Test. 122-23. Ultimately, the Register ruled that the musical works were indeed subject to the Section 115 mechanical license, but that does not change the fact that the owners of the musical works rights had agreed to accept a royalty of 10% of the retail price long before a "pall of uncertainty" was cast over the market concerning whether the Section 115 statutory license applies to musical works used in ringtones. Eisenberg Reb. Test. at 122-23.

105. In the end, the uncontested facts are that the owners of musical works copyrights agreed to accept 10% of revenues to license their rights for use in ring tones. The owners of the sound recording rights negotiated royalty rates four times higher than the publishers. Eisenberg Reb. Test. at 230 (negotiated rate was five times higher, out of which the publishers would take their 10%).

106. Finally, the webcasters attack the use of the ringtone market on the grounds that it is too new, and that based upon testimony by Sony executive Mr. Eisenberg, "Sony admits" that only a "handful of agreements have been entered into." Joint DiMA/Br. PFF ¶ 58. But this statement was taken out of context from a brief filed by RIAA in a section 115 proceeding. When Mr. Eisenberg was asked about the quotation, his response was "I didn't draft this so I'm not quite sure. Because of the conjunctive sentence I'm not sure what it's referring to. My personal belief is that the ringtone market is a very lucrative market. We actually sell either as many or more ringtones than [we] sell digital downloads." Eisenberg Reb. Test. at 218. Mr. Eisenberg himself was aware of numerous agreements with SONY/BMG alone. *Id.* at 221, 229 (four with telephone companies, and an unidentified number of additional agreements with small telephone companies and aggregators). The record thus does not support the assertion that the

ringtone market is too new and small to use as a relevant data point. What it does support, unequivocally, is that sound recording copyrights are worth many multiples more than musical works copyrights.

II. THE WEBCASTERS' CRITICISMS OF DR. PELCOVITS'S BENCHMARK ANALYSIS ARE BASED ON THEIR ERRONEOUS MARKET DEFINITION AND THEIR EFFORT TO UNDERVALUE SOUND RECORDINGS.

A. Webcaster Attacks on the Pelcovits Model Based on Its Allegedly Anticompetitive Premises Should be Rejected.

107. The centerpiece of the webcasters' criticism of Dr. Pelcovits's use of the market for interactive webcasting as a benchmark is that record companies have "too much" market power in that market, as they allegedly do in all other markets in which they participate. In their view, because the record companies "can exercise monopoly power" in markets in which they participate, Joint DiMA/Br. PFF ¶ 81, reliance on any real world market involving the record companies is "antithetical to the hypothetical competitive market contemplated by section 114" and so "must be rejected." *Id.* ¶ 82.

108. This criticism turns entirely on the webcasters' parallel legal claim that the willing buyer/willing seller standard calls for construction of a hypothetical market in which the sellers (but not the buyers) lack any market power. *See, e.g.*, DiMA/Br. PFF ¶ 83 (rejecting Pelcovits's model because in the benchmark market "each buyer was required to deal with each seller — in short, each seller had the market power of a monopolist."); *id.* ¶ 88 (rejecting model because no adjustment made "to account for the lack of competition"); *id.* ¶ 98 (same). To the extent that the Court joins previous tribunals in rejecting this legal claim, little is left of the webcasters' criticism of the Pelcovits benchmark.

B. Other Criticisms of the Pelcovits Model Are Meritless.

109. In addition to this overarching criticism of the Pelcovits model, there are factual claims germane to the collateral criticisms the webcasters' mount against Dr. Pelcovits' benchmark that merit separate response.

110. *First,* the webcasters criticize certain of the contracts upon which Dr. Pelcovits relied in deriving rates in the benchmark market. Joint DiMA/Br. PFF ¶¶ 99-103. To begin, the webcasters fault Dr. Pelcovits for using only agreements with services that seek to offer "a comprehensive user experience." Joint DiMA/Br. PFF ¶¶ 99-100. Of course, if Dr. Pelcovits had used agreements with niche music services, he likely would have been accused by the webcasters of selecting agreements with smaller, weaker services who would have less bargaining power. Indeed, Dr. Pelcovits used agreements from every major record company and from all five of the on demand services that operate in the market. *See* SX Ex. 001-017 RR (agreements Dr. Pelcovits reviewed as interactive service benchmarks).

111. In the next breath, the webcasters claim that the agreements on which Dr. Pelcovits relied were in fact negotiated with small and weak music services. Joint DiMA/Br. PFF at ¶103. This is preposterous. The webcasters cite no evidence for this proposition, and these services that supposedly had little market power were in fact negotiating on behalf of industry giants like Yahoo! and AOL. Yahoo!, for one, was perfectly satisfied with the rates negotiated on its behalf. Roback Dir. Test. at 274-75. AOL subsequently bought the company that negotiated its license, Winston Dir. Test. at 30, removing any doubt about its muscle in the market. Indeed, as Mr. Eisenberg testified, both AOL and Yahoo! [REDACTED]. Eisenberg WRT at 10 n.9.

112. Dr. Pelcovits is faulted, as well, for not examining agreements between interactive music services and independent record labels. Joint DiMA/Br. PFF at ¶ 100. But Yahoo! and AOL both offer an interactive music service as well as statutory webcasting. Winston Dir. Test. at 30-31; Roback Dir. Test. at 22. If there were deals focused exclusively on interactive music services between Yahoo! or AOL and indies that would have affected Dr. Pelcovits's analysis, one can be sure these DiMA member companies would have provided some expert analysis of them. But they did nothing of the sort. Dr. Pelcovits cannot be criticized for focusing on the four largest sellers, making up the vast majority of the sound recording market, negotiating with the 5 buyers who make the entire interactive service market.

113. In this same vein, the webcasters contend that seven of the seventeen agreements on which Dr. Pelcovits relied were negotiated with affiliates of the record companies. Joint DiMA/Br. PFF at ¶ 102. But the webcasters make no attempt to show that this affected the negotiations in the slightest. And more to the point, Dr. Jaffe conceded that even if each of the challenged contracts were removed from consideration, he has no reason to think it would change Dr. Pelcovits benchmark calculation in the slightest. Jaffe Reb. Test. at 177. Indeed, as Mr. Eisenberg's testimony show, removing such agreements would have no effect on the analysis. Eisenberg WRT at 10 n.9.

114. *Second,* the webcasters claim interactive music service agreements were rejected by the 2002 CARP because those services are "fundamentally non-comparable." Joint DiMA/Br. PFF at ¶ 90. As Dr. Pelcovits explained, however, the problem in 2002 was that the RIAA submitted the interactive music service agreements without any attempt to adjust the rates in the benchmark agreements to account for the absence of interactivity in the target market. Dr. Pelcovits, of course, made such an adjustment. Pelcovits WDT at 9-10.

115. More generally, the webcasters' suggestion that the benchmark agreements used by Dr. Pelcovits should be rejected because they involve a somewhat different market than the market for non-interactive webcasting licenses is puzzling. Joint DiMA/Br. PFF ¶ 90. The entire point of a benchmark is to draw conclusions about one market based on another. Jaffe WDT at 10. Indeed, if it were true, as the webcasters claim, that no benchmark market can be considered unless it involves the sale of a "comparable" right, *id.*, the webcasters' benchmark market must be excluded from consideration as well, since the rights involved in musical works rights are by definition a different animal than sound recording rights.

116. *Third*, the webcasters suggest that interactive music services are fundamentally different than statutory webcasting services because they substitute for purchases of CDs to a greater degree than statutory webcasting services. Indeed, the webcasters argue, the record companies take this fact into account and charge higher royalties for interactive services. Joint DiMA/Br. PFF ¶¶ 131-32. The point of this recitation is difficult to divine, since Dr. Pelcovits considered these facts and adjusted his benchmark rates downward to account for the possibility that the benchmark rates for interactive music services had been raised to offset lost CD sales. Pelcovits Dir. Test. I at 83-86; Pelcovits WDT at 51. Indeed, as it turned out, Dr. Pelcovits adjusted the rates too much, to the benefit of the webcasters. During the rebuttal case he obtained evidence showing that the difference between interactive and non-interactive services with respect to substitution is minimal. Pelcovits WRT at 27.

117. *Fourth,* the webcasters claim that the adjustment for interactivity that Dr. Pelcovits calculated was based on faulty assumptions about demand elasticity. Joint DiMA/Br. PFF ¶¶ 136-41. To begin, the webcasters create a straw man, asserting that Dr. Pelcovits assumed that demand elasticities in the two markets were "exactly the same." Jaffe Reb. Test. at

47. What Dr. Pelcovits said was that he assumed that demand elasticities were likely to be "very close in the relevant range of the demand curves." Pelcovits WDT at 36. Of course, where his own analysis was concerned, Dr. Jaffe was willing to tolerate some uncertainty: "So my view is it's not possible to come in here and give you a precise number which is the reasonable rate or the willing buyer/willing seller rate. Economics is a somewhat imprecise science and the data in this area are somewhat limited." Jaffe Dir. Test. at 51; *see also* Jaffe Dir. Test. at 112 (referring to the "range of imprecision of all of these analyses. . . "). Dr. Jaffe apparently holds Dr. Pelcovits to a higher standard.

118. In any event, there is no real challenge to Dr. Pelcovits's assumptions about demand elasticity. Dr. Pelcovits testified that demand elasticities were likely very similar in part because the benchmark and target services are similar and are sold to similar types of consumers in the same way. Pelcovits Dir. Test. I at 66. Although the webcasters unabashedly assert that Dr. Pelcovits was contradicted by "the evidence from almost every other witness about the fundamental differences between the product offerings," Joint DiMA/Br. PFF ¶¶ 138, they cite to the testimony of not one single witness for this proposition. *Id.* And with good reason — even Dr. Jaffe agreed with Dr. Pelcovits that the markets were similar except for interactivity. Jaffe Reb. Test. at 143; Pelcovits Reb. Test. at 9-10.

119. Moreover, Dr. Jaffe agreed that the demand curves for the two markets were likely to be similar if the substitutes for the two types of services were the same. Jaffe Reb. Test. at 145. But he conducted no empirical study of the substitutes for these services. Jaffe Reb. Test. at 144. He identified only two potential substitutes: terrestrial radio and CDs. Jaffe Reb. Test. at 145. He had not studied either potential substitute, or whether those potential substitutes had any differential impact on interactive music services and non-interactive webcasting. Jaffe

Reb. Test. at 144-46. Dr. Jaffe had looked at the NPD data analyzed in Dr. Pelcovits's rebuttal testimony, *see* Pelcovits WRT at 27, but did not even recall the results, much less have any basis to disagree with Dr. Pelcovits's conclusion that there is no appreciable difference in the degree to which interactive music services and webcasting services substitute for CD purchases. Jaffe Reb. Test. at 144.

120. *Fifth,* the webcasters claim that Dr. Pelcovits improperly relied on subscription prices in making his comparison between interactive and non-interactive markets. Joint DiMA/Br. PFF ¶¶ 148-153. SoundExchange has already addressed this issue in its proposed findings of fact. *See* SX PFF ¶¶ 319-31. It bears repeating, however, that the ad-supported market is the one Yahoo! regards as its best business opportunity. Roback Dir. Test. at 266. With a $20 billion dollar upside potential, Yahoo! considers the advertising supported webcasting market a better opportunity than digital downloads. Roback Reb. Test at 22, 140-41.

121. *Sixth,* the webcasters argue that Dr. Pelcovits made assumptions that lead to "absurd" results. Joint DiMA/Br. PFF ¶¶ 142-47. Specifically, they claim (accurately) that Dr. Pelcovits assumed that the production costs plus the profit margin are the same for both the interactive music services and the statutory webcasting services. But this cannot be, according to Dr. Jaffe, because that would mean that the subscription-supported webcasting services are losing money even without paying a sound recording royalty. Joint DiMA/Br. PFF ¶¶ 143. *See* Jaffe WRT at 19-22 (headed "Dr. Pelcovits' Model Yields a Negative Royalty Rate").

122. In this argument, the webcasters lead with their collective chin. In reality, what the "elementary algebra" the webcasters want to employ reveals is that a huge portion of the cost-plus-profit component of Dr. Pelcovits' assumption is, in fact, pure profit.

123. The math is straightforward. Yahoo! earns an [REDACTED] gross profit margin on its subscription-based statutory webcasting service, LAUNCHCast Plus. Roback Dir. Test. at 182-83; SX Trial Ex. 158 at CRB-R-YAH000044. Yahoo! charges consumers a subscription fee of approximately $3.00 per month for that service. Roback Dir. Test. at 28-29. Yahoo! therefore is earning a gross profit of [REDACTED] per customer per month, and incurs costs of [REDACTED] per customer per month. Pelcovits WRT at 30. *See generally* Jaffe Reb. Test. at 148-152. The problem with the webcasters' critique of Dr. Pelcovits is readily apparent — his assumptions do not yield a "negative royalty" because the services are highly profitable, and an increase in the fee will simply reduce the profit. *See* Jaffe Reb. Test. at 152 (agreeing that if the consumer price and gross profit margin were as stated, there would be plenty of room to increase the sound recording royalty to 30% of revenues and still leave the webcaster with a healthy profit).

124. The further problem with the webcasters' complaint, as Dr. Pelcovits explained in his rebuttal testimony, is that markets are dynamic and can be expected to adjust to an increase in the royalty rate. Pelcovits WRT at 30. And it is absolutely false to say, as the webcasters do, that the rebuttal testimony represents an attempt by Dr. Pelcovits to "recant" his trial testimony after he "or SoundExchange's lawyers" belatedly recognized that he had made a significant concession during cross-examination. Joint DiMA/Br. PFF ¶ 144. In fact, the very first time he was asked about this issue by Mr. Joseph during the opening phase of the case — and immediately *before* he made the "concession" that the webcasters quote — Dr. Pelcovits told Mr. Joseph that Mr. Joseph's hypothetical did not "allow[] the market to adjust for the higher fee." Pelcovits Dir. Test. II at 190. *See also* Pelcovits Dir. Test. II at 241.

C. The Webcasters' Personal Attack on Dr. Pelcovits Proves the Wisdom of the Old Saying That Those Who Live in Glass Houses Should Not Throw Stones.

125. The webcasters claim that Dr. Pelcovits's claims should be rejected not on their merits, but because Dr. Pelcovits is not sufficiently knowledgeable and not sufficiently independent. DiMA/Br. PFF ¶¶ 154-172. For the most part this is an *ad hominem* attack that does not merit response. Dr. Pelcovits is a highly credentialed economist who was qualified as an expert in this case. The substance and persuasiveness of his testimony should be evaluated on its merits, and not based on spurious claims about Dr. Pelcovits's character or background.

126. That said, the webcasters call Dr. Pelcovits to task for relying on characterizations of record company contracts in various markets provided by the people who negotiated those contracts, rather than engaging in independent analysis of the contracts. *See, e.g.*, DiMA/Br. PFF ¶¶ 159-160 (criticizing Dr. Pelcovits for relying on information provided by Sony-BMG's Mr. Eisenberg about the substance of record industry contracts and musical works contracts). At the same time the webcasters criticize Dr. Pelcovits for engaging in independent analysis of the contracts and *not* consulting with industry executives. *Compare id.* ¶ 156 (criticizing Dr. Pelcovits for *not* speaking with record company employees). The important point is that the webcasters do not claim that any of the information that Dr. Pelcovits "parroted" from Mr. Eisenberg concerning the musical works and sound recording copyrights was in any way inaccurate, and do not claim that Dr. Pelcovits' analysis of the interactive contracts was in any way inaccurate, making this criticism all the more puzzling.

127. This criticism is especially ironic, as it is the webcasters' own expert, Dr. Jaffe, whose credibility is fairly subject to this criticism. While the webcasters criticize Dr. Pelcovits for not remembering the names of the record industry executives with whom he spoke to make

sure he had an adequate understanding of the contracts, DiMA/Br. PFF ¶ 156, this was not a problem for Dr. Jaffe — he testified that he never spoke with *anyone* in the industry about how the record companies are compensated in other digital markets. Jaffe Dir. Test. at 69-70.

128. Dr. Jaffe's affirmative case depends on the comparison between musical works and sound recordings, and his claim that the value of the two copyrights is "identical." Yet he conducted no investigation whatsoever of how those two copyrights are treated in markets other than the market for background music for movies and television shows. Concerning the differences in treatment of the two copyrights in the ringtones market, for example, his testimony was "I've actually wondered about that," Jaffe Dir. Test. at 123, and that "I've not thought about that . . . it's not something that I've studied." *Id.* 124. His curiosity did not lead him to study the market subsequent to his initial testimony in June. Jaffe Reb. Test. at 134. At least he had some awareness that market existed. When he testified in the direct case in June of 2006, he was completely unaware of the market for clip samples. Jaffe Dir. Test. at 124-27. He did not study the download market. Jaffe Reb. Test at 133-35; *see also id.* at 178-79 (testifying to no knowledge of ringtone, clip sample, or video markets).

129. And although Dr. Jaffe acknowledged that the movie background music market differed critically from the webcasting market because movie producers were free to make "cover band" sound recordings of desired songs, while webcasters were not, Jaffe Reb. Test. at 97, he gave no thought to how that difference might effect his analysis. Jaffe Dir. Test. at 98-99. He did not even consider all of the revenues obtained by the record companies in making his claim about revenues. *Id.* at 118-20 ("I'm quite sure they were not taken into account. I don't know what they are."). While the webcasters rely on Dr. Jaffe's testimony that webcasters need licenses from all four major record labels, when Dr. Jaffe was asked why he believed that to be

the case, his testimony was "I don't remember. I thought there was testimony on that, but as I sit here today I really don't remember." *Id.* at 119-120. While he concluded that the interactive webcasting marketplace was "monopolistic" because the record companies' contracts in the market contained "most favored nations" clauses, it turned out the factual basis for that claim was that he asked his client for any contracts that contained such clauses and was shown "two or three" contracts. Jaffe Reb. Test at 158. He criticized Dr. Pelcovits' treatment of certain video contracts, Jaffe Reb. Test. at. 24, but acknowledged that he neither read those contracts himself nor was familiar with their terms. Jaffe Reb. Test. at 172-173. He opined that interactive and non-interactive webcasting services were likely to have different substitutes, but conducted no empirical analysis on the subject. Jaffe Reb. Test. 144-46. He confidently commented on how interactive music services work, Jaffe Reb. Test. at 218-19, but has never used one himself. Jaffe Reb. Test. at 234-35.

130. Equally ironic is the webcasters' complaint that Dr. Pelcovits was not sufficiently curious about background facts about the record industry, or facts concerning the various markets in which the record companies sell their sound recordings. Far more notable was Dr. Jaffe's very limited knowledge of, and interest in, the markets he was opining about. *See, e.g.,* Jaffe Dir. Test at 66-70 (did not investigate changes in costs and revenues of webcasters since 2002 compensation of sound recording copyright owners in other digital markets); *id.* 133-134 (does not know what has happened to number of webcasters since 2002 proceeding). While his criticism of Dr. Pelcovits's benchmark was based in part on his claim that Dr. Pelcovits relied on contracts between the record companies and wholly owned subsidiaries, he was unaware that the record companies had sold those subsidiaries to independent third parties. Jaffe Reb. Test. at 111. Given Dr. Jaffe's view that the governing legal standard required market participants not

tainted by market power, Dr. Jaffe rejected wholesale almost all record company economic evidence based in large part on an "HHI" calculation he performed concerning concentration in the record industry. Yet he never even considered performing a similar analysis on the buyer's side of the market. *Id.* at 124. Dr. Jaffe's written statement states that MusicNet is owned in part by RealNetworks. Jaffe WRT at 10. When SoundExchange counsel attempted to discuss that relationship with him on the stand, he did not recall having said it. Jaffe Reb. Test. at 176. He testified on behalf of NPR in the rebuttal phase of this case, but the last time he had looked at their budget was sometime in the 1990s. *Id.* at 269-70. Dr. Jaffe was not even aware of the percentage of the royalties that are at issue in this case that is paid to artists. *Id.* at 205.

131. If curiosity and a substantial background knowledge of the record industry are prerequisites, it is Dr. Jaffe's conclusions that should be subject to close scrutiny.

III. THE WEBCASTERS' "OTHER MARKETPLACE EVIDENCE" PROVES NOTHING.

132. In their proposed findings, the webcasters claim that other marketplace evidence supports their proposed rate. Joint DiMA/Br. PFF ¶¶ 257-83. Nothing could be further from the truth.

A. The Yahoo!/Indie Deals

133. The webcasters offer as purported evidence of marketplace royalty rates for webcasting a handful of deals between the world's largest webcaster, Yahoo!, and some of the world's smallest independent record companies. *See* Joint DiMA/Br. PFF ¶¶ 272-73.

134. Remarkably, the webcasters characterize these deals as embracing "companies with significant independent market share." DiMA/Br. PFF ¶ 272. In fact, the independent

labels that entered into agreements with Yahoo! represent, in the aggregate, less than [REDACTED] percent of the market — and that assumes that all independent labels who had the opportunity to "opt-in" did so. Pelcovits WRT at 8. Some of the individual independent record labels which entered into such agreements, such as Daniel Ho Creations, have market shares as small as [REDACTED]. Pelcovits WRT at 8-9.

135. Even Yahoo! witness Robert Roback agreed that the deals between Yahoo! and certain indie labels represent a "very small" percentage of the overall music offerings of Yahoo!. Roback Reb. Test. at 46-47. Moreover, no royalties have ever been paid under any of those agreements. Roback Reb. Test. at 145-47.

136. As small as these agreements are in terms of the percentage of the market that they represent, that percentage is shrinking. A representative of a consortium of indie labels in the United Kingdom, Simon Wheeler, testified that certain English indie labels agreed to Yahoo!'s terms and came to regret their decision. The agreements produced none of the promised benefits, including increased play for the English labels on Yahoo!'s LAUNCHCast service, and the labels terminated the agreements. Wheeler WRT at 2-4.

137. Of equal importance, the Yahoo!/indie deals are bundled agreements that include license rights for interactive music services and digital downloads as well as webcasting. As Dr. Pelcovits observed, the independent record labels may have accepted less for one component of the bundle, such as royalties for statutory webcasting, in return for a better deal on another component of the bundle. Pelcovits WRT at 10. The Librarian has previously held that agreements that involve a bundle services, from which one term is plucked as a benchmark,

provide an arbitrary basis on which to set rates and terms. SoundExchange's Reply Conclusions of Law.

138. As it turns out, Dr. Pelcovits was precisely correct. Yahoo! bought the concessions that it got with respect to the webcasting royalty by paying the indie labels a premium for sales of downloads. In order to get indie labels to agree to a new webcasting royalty, Yahoo! offered the indie labels an additional five cents per download. Roback Reb. Test. at 139. For example, Yahoo! informed one indie label that "in exchange for accepting the new structure, we have agreed to bump up the permanent download wholesale price by five cents to 70 cents." Roback Reb. Test. at 139-40.

139. As the Webcaster I CARP held, agreements between large market players and small entities are not good benchmarks — something with which Dr. Jaffe agreed. Dr. Jaffe agreed that if in its deals with independent record companies Yahoo! traded off a higher digital download rate in order to get a pay lower rate for statutory webcasting, that would affect the usefulness of those agreements as a benchmark in this case. Jaffe Reb. Test. at 209. Not surprisingly, even Dr. Jaffe does not hold out the deals between Yahoo! and the independent record companies as a benchmark in this case. Jaffe Reb. Test. at 208.

B. The Custom Radio Deals

140. DiMA and the Broadcasters attempt to spin the argument that it is record companies, not custom radio providers, that have leverage in negotiations by pointing to the potential threat of copyright infringement litigation. Joint DiMA/Br. PFF ¶¶ 264-71. But that type of "leverage" will always exist in a market where there is no compulsory license. That is

the nature of a copyright; absent a compulsory license, one needs to negotiate an agreement to be able to use the copyright.

141. The issue is, once the statutory license is introduced, how does that affect the bargaining power of the participants in that market which webcasters themselves agree is a close substitute for DMCA-compliant webcasting? On this issue, the evidence is undisputed. The existence of the statutory license means that webcasters have an alternative — inexpensive streaming based on the CARP rate — that they did not have before. Bryan WDT at 13; Bryan Dir. Test. at 66; Kenswil WDT at 12; Eisenberg WDT at 17. The evidence is clear that the existing CARP rates have driven down rates in the custom radio market beyond what they would be in a free market in the absence of a compulsory license.

142. Indeed, the very UMG agreement on which the webcasters rely, and the circumstances of its negotiation, prove the point. Although the webcasters attempt to portray the UMG/Yahoo! custom radio agreement as a victory for UMG, the evidence is to the contrary. Yahoo! originally entered into a custom radio deal with UMG in 2001 at what Yahoo!'s Robert Roback characterized as "an extremely high rate." Roback Reb. Test. at 16-17. Yahoo! refused to renew the deal unless UMG lowered its rates, and UMG refused to do so. Roback Reb. Test. at 17. For two years, therefore, Yahoo! operated its custom radio service without UMG content, but because of the statutory license, Yahoo simply used UMG content for its statutory webcasting service; no user was denied access to UMG sound recordings Roback Reb. Test. at 17. After two years, the parties inked a new deal that Yahoo considered a "more agreeable arrangement" than the 2001 deal that UMG originally had declined to change. Roback Dir. Test. at 377-78. [REDACTED] it is plain that UMG made concessions after Yahoo! refused to renew the 2001 agreement.

143. The history of this negotiation makes plain as a matter of fact what both Dr. Jaffe and Dr. Pelcovits agreed to as a matter of theory: the custom radio royalty rate will be influenced by the statutory webcasting rate where statutory webcasting is a close though not perfect substitute for custom radio. Pelcovits Dir. Test. I at 251; 253-55; 261-62; Pelcovits Reb. Test. at 83-84; Pelcovits WDT at 20; Jaffe Reb. Test. at 210-13.

144. In addition, DiMA and the Broadcasters make a host of those representations about the Yahoo!-UMG agreement that are deceptive in at least the following respects:

145. *First*, there is no dispute that the LaunchCast service is one where there is a legal dispute about its status that means its value as a benchmark for free market rates is highly doubtful. Roback WRT at 6.

146. *Second*, the "flat fees" in the agreement ensured that UMG received [REDACTED] — all for the one "My Station" of the hundreds of stations that LaunchCast offers to its users. Yahoo! pays additional sums to UMG through SoundExchange for statutory transmissions on all of the other stations. Roback WRT at 4 n.3.

147. *Third*, the subscription portion of the agreement resulted in Yahoo! [REDACTED] Roback Reb. Test. at 104-06. SX Tr. Ex. 151.

148. *Fourth*, Yahoo! neglects to mention that UMG received additional compensation [REDACTED] Roback Reb. Test. at 106-08; SX Tr. Ex. 151.

149. *Fifth*, the UMG-Yahoo! agreement prohibits Yahoo! from disseminating its service over a cellular phone network. Roback Reb. Test. at 118-19.

150. DiMA and Broadcasters arguments focus on one agreement between UMG and Yahoo!, and ignore all of the other custom radio agreements discussed in the record, including those other agreements to which Yahoo! is a party (or which Yahoo! extended after acquiring other companies). Those agreements demonstrate that:

- the "greater of" rate structure is the rate structure in each agreement with percentage of revenue ranging [REDACTED];
- there is significant compensation even for noninteractive uses [REDACTED); and
- record companies routinely receive a host of addition consideration, such as promotional considerations, as well as security protections and limitations on transmission over cellular networks, that are the product of willing buyers and willing sellers negotiating in the market.

151. SX PFF ¶¶ 382-4-1; Bryan WDT at 14; Bryan Dir. Test. at 67-68; SX Ex. 002 DR (WMG-Next Radio Solutions custom radio agreement) (§ 6.03(a)); Kenswil WDT at 12; Kenswil Dir. Test. at 47-48; SX Ex. 0011 DR (UMG-RCS custom radio agreement); Eisenberg WDT at 18; Eisenberg Dir. Test. at 72; SX Ex. 004 DR (SONY BMG-MusicMatch custom radio agreement).

C. The 2003 SDARS Agreement

152. DiMA and Broadcasters now point to the agreement between SoundExchange and the SDARS for a separate statutory license under a different rate standard in 2003 — when the SDARS were barely beginning — as a basis for rates and terms here. DiMA/Br. Joint PFF ¶¶ 279-81.

153. There is no record evidence about that agreement to reflect the assumptions that went into that agreement, much less how to translate those agreements into a rate here. Indeed,

the sole record evidence is testimony from Dr. Pelcovits about why the SDARS agreement provides a poor benchmark. Pelcovits WRT at 6-8.

154. Moreover, the SDARS rates and terms are governed by a standard other than the willing buyer/willing seller standard, and the Librarian has made clear that one cannot, without more, simply import rates from one legal standard into a proceeding. Librarian's Decision, 67 Fed. Reg. at 45244.

155. Further, the agreement itself is non-precedential and both the SDARS and SoundExchange concede that it has no value in setting rates and terms even for the SDARS in the coming years. Pelcovits WRT at 6-8; SX Ex. 238 RP (filing of SoundExchange and SDARS). As the Librarian has previously made clear, such non-precedential agreements, especially without any evidence in the record about the assumptions behind those agreements, render any use of those agreements "highly suspect." Webcaster I CARP Report at 90 (citing decisions of the Librarian).

D. The 2003 "Push-Forward" Agreement

156. All parties agree that the 2003 decision to push forward the rates pending reform of the copyright royalty system does not provide the parties' evaluation of the fair market value of streaming. Potter WDT at 7-8; Simson WDT at 30-31. There is thus no basis to attack SoundExchange's rate proposal based on that agreement, which was based on issues other than willing buyer/willing seller considerations. Pelcovits WDT at 21.

157. DiMA and the Broadcasters' suggestion that the 2003 agreement should be some evidence that a "lesser of" rate represents a marketplace arrangement is belied both by the agreement itself and evidence in the record. As explained by Mr. Eisenberg, the agreement does

not operate so much as a "lesser of" agreement because the percentage of revenue portion was structured as a "greater of" a percentage of revenue or a per subscriber minimum Moreover, webcasters at the time made an argument they no longer make — that some could not account for performances, and others could not account for revenue very well. Eisenberg Reb. Test. at 162-63.

158. Finally, to the extent that the 2003 agreement reflected any evaluation of the participants as to the fair market value of streaming in 2003, the Court should then take account of what has happened since that time. The record is undisputed that in 2003 digital music services were just beginning to take hold — iTunes began then — and the evidence in the marketplace is overwhelming that digital music services, and especially webcasting, have become more lucrative since that time. Bryan Dir. Test. at 13-14; Eisenberg Dir. Test. at 22, 258; SX PFF Sections VI-VII.

159. To the extent that the Court finds the 2003 rates to be instructive, the only conclusion that can be drawn is that the rates should go up — by a significant amount — from those levels. SX PFF Sections VI-VII. Moreover, as is clear by from the host of marketplace agreements in the record, the "greater of" rate structure has become the norm in the industry and, in every market, record companies receive a significant percentage of the revenues of digital music services. SX PFF Section V(C).

E. The 2003 PES Agreement

160. The 2003 PES Agreement suffers from the same flaws as the SDARS agreement. There is no record evidence about that agreement at all, except for Dr. Pelcovits' testimony about why it is a poor benchmark. Pelcovits WDT at 20-23. Moreover, the PES rates and terms are

governed by a standard other than the willing buyer/willing seller standard, and the Librarian has made clear that one cannot, without more, simply import rates from one legal standard into a proceeding. Librarian's Decision, 67 Fed. Reg. at 45244.

IV. THE WEBCASTERS' ATTACKS ON DR. BRYNJOLFSSON IGNORE SEVERAL KEY FACTS.

A. The Court Admitted Dr. Brynjolfsson As an Expert Witness in the Field of Digital Goods, Including Sound Recordings, and Their Pricing.

161. The webcasters' claim that Dr. Brynjolfsson "is not qualified" is without merit. Joint DiMA/Br. PFF ¶ 233-39.

162. The Copyright Royalty Judges admitted Dr. Brynjolfsson as an expert in the business of digital distribution of information and in the pricing of digital goods in both the direct and rebuttal hearings. Brynjolfsson Dir. Test. I at 24, 26; Brynjolfsson Reb. Test. at 8, 21. The Copyright Royalty Judges overruled an objection to Dr. Brynjolfsson's qualifications. Brynjolfsson Reb. Test. at 21.

163. Dr. Brynjolfsson is the Schussel Professor of Management at the MIT Sloan School of Management, and his research and teaching focuses on the economics of information technology and digital goods. Brynjolfsson WDT at 1. His research "focuses on the economics of information and information technology including the productivity effects, the pricing and market structure for digital information goods, the bundling and aggregation of digital information goods and how markets and organizations are affected by advances in information technology and the Internet in particular." Brynjolfsson Dir. Test. I at 16. He has published dozens of articles in this area, receiving awards on multiple occasions for his work. Brynjolfsson Dir. Test. I at 17. He has also served on boards of directors to companies and has advised the

Federal Reserve Bank of Boston. Brynjolfsson Dir. Test. I at 21; Brynjolfsson Dir. Test. II at 315-16. He has recently been nominated to be a Research Associate at the National Bureau of Economic Research and to serve on the Technical Advisory Group for Networks and Information Technology of the President's Council of Advisors on Science and Technology. Brynjolfsson Reb. Test. at 8; *see generally* Brynjolfsson WDT App. C (Dr. Brynjolfsson's curriculum vitae).

164. Dr. Brynjolfsson also testified that he has a great deal of familiarity with the way that music is delivered to consumers over the Internet, and he became more familiar through his research for this proceeding. Brynjolfsson Dir. Test. I at 22-23. When DiMA attempted to argue that his experience was not applicable to webcasting, Dr. Brynjolfsson flatly rejected that argument: "No, that's not correct. It has a tremendous amount to do with webcasting. It's the same set of incentives and economics. What we look for in academia are some general principles that can be applied to multiple different categories so that you don't have to start from scratch every time you encounter a new company or a new firm." Brynjolfsson Dir. Test. I at 178-79. Dr. Brynjolfsson also testified that "one of the most common things I do in my MBA classes is we discuss the music industry." Brynjolfsson Dir. Test. I at 273.

B. Dr. Brynjolfsson's Methodology Is a Standard Pricing Methodology Used by Business People and Academics.

1. Dr. Brynjolfsson Used a Standard Pricing Methodology.

165. Dr. Brynjolfsson testified that analyzing costs and revenues in the manner that he did is a "very straightforward application of a fairly standard methodology." Brynjolfsson Reb. Test. at 32. He also testified that this methodology was "fundamental in economics" as a method for understanding an industry. Brynjolfsson Dir. Test. I at 28. He testified that

"[v]irtually every case I teach for my MBA students we do some sort of cost and revenue analysis. We look at the bargaining power as well I should mention." Brynjolfsson Dir. Test. I at 27-28. When asked whether his method is used to establish the market price for a particular good, Dr. Brynjolfsson replied, "Yes, I think it's arguably the *basic thing* we teach in business schools when we look at how markets work." Brynjolfsson Dir. Test. I at 28 (emphasis added).

166. Dr. Brynjolfsson testified quite clearly that his method is used in real-world markets: "I believe that this is exactly how business[es] make decisions. I've been on a number of boards, I've taught hundreds perhaps thousands of MBA students and this is exactly the type of thing that we do. We look at the revenues and the costs and see whether or not it's a profitable business, ... And then you see how much you can bargain for." Brynjolfsson Dir. Test. II at 315-16. For example, in teaching at both Stanford and MIT, Dr. Brynjolfsson has had MBA students research and analyze the costs and revenues of various web-based companies. Brynjolfsson Dir. Test. II at 95.

2. Dr. Brynjolfsson Reasonably Relied on Appropriate Sources for His Models.

167. Dr. Brynjolfsson made his initial calculations based on publicly available documents. *See generally* SoundExchange PFF Section VI.C. In so doing, Dr. Brynjolfsson reviewed every publicly available source that he could find, including third-party industry analyst reports, data from investment banks, and statements by the webcasters themselves. Brynjolfsson WDT at 2; Brynjolfsson Dir. Test. I at 48; Brynjolfsson Reb. Test. at 36. Dr. Brynjolfsson used his expertise and professional judgment to evaluate these sources and triangulate on the ultimate result. Brynjolfsson WDT at 2; Brynjolfsson Dir. Test. I at 48; Brynjolfsson Reb. Test. at 36. In particular, he noted that total advertising revenues were a result

of the interplay between the cost (CPMs), the sell-out rate, and the number of ads available per hour; each number only had meaning in relation to the others (*e.g.*, a webcaster could have lower CPMs but higher sales or higher CPMs with lower sales and still have the same revenue). Brynjolfsson WDT at 25. Dr. Brynjolfsson testified that the data he relied upon for this proceeding are of similar quality to the data relied on in academic studies done by economists. Brynjolfsson Reb. Test. at 37.

168. This Court specifically held that these sources, and in particular the AccuStream iMedia Research data, were the type on which an expert would reasonably rely, soundly rejecting claims otherwise by the webcasters. *See* Order Denying Joint. Mot. to Strike Portions of the Test. of Dr. Erik Brynjolfsson, June 5, 2006. This Court held specifically, "Market research data of the type compiled by Accustream is reasonably relied upon by management professors like Dr. Brynjolfsson, Wall Street analysts and even practitioners in the industry in testing their hypotheses and opinions about the industry, particularly in the absence of other publicly available and demonstratively more rigorously constructed scientific surveys of the industry. [citation omitted] Further questions about the accuracy of the Accustream data are more properly the subject of cross-examination and/or rebuttal evidence challenging the weight to be ascribed to the Brynjolfsson models which employ the Accustream data." *Id.* at 1-2. Despite this admonition, the webcasters produced no evidence in rebuttal that undermined Dr. Brynjolfsson's reliance on the publicly available data in his models, and in fact, their own documents confirmed his initial analysis. Indeed, in a presentation to Clear Channel Senior Vice-Presidents, Evan Harrison, Mr. Parsons' boss, explained that, in contrast to being ancillary, "streaming is core to radio's future." SX. Ex. 110; Parsons Dir. Test. at 211-13. That statement is consistent with the statements made by Mr Harrison and other senior Broadcaster officials and

directly contradicts the claims that Broadcasters make in this proceeding. SX PFF Section VI.C. In attacking Dr. Brynjolfsson's reliance on sources, DiMA and the Broadcasters have simply recycled the arguments that this Court has previously rejected. Joint DiMA/Br. PFF Section III.C.2.b.

3. DiMA and the Broadcasters Have Not Undermined Either Dr. Brynjolfsson's Methodological Approach or Its Implementation.

169. DiMA and the Broadcasters make a variety of other claims regarding Dr. Brynjolfsson's analyses. None of these arguments has any merit.

170. ***First***, DiMA and the Broadcasters repeatedly argue that Dr. Brynjolfsson's hypothetical market is not competitive. *See, e.g.*, Joint DiMA/Br. PFF ¶¶ 173, 175-77, 187-91. These arguments are based entirely on webcasters' warped view of the willing buyer/willing seller standard and thus are legal arguments, not findings of fact. Nonetheless, they are without merit. *See supra* Section I; SX Reply Conc. Section I.

171. ***Second***, DiMA and the Broadcasters' attempt to claim that Live365's broadcaster revenues are somehow actually webcasting costs is simply without merit. Joint DiMA/Br. PFF ¶ 225; *see also* Lam WRT ¶ 4.

172. Both Mr. Porter and Mr. Lam acknowledged in their testimony that Live365's webcaster customers pay Live365 for streaming costs like bandwidth. With the so-called "broadcasting" services, webcasters pay Live365 to "offset [] the costs that allow them to stream," and Live365 supplies them with the "services, servers and infrastructure, that the [web]casters would otherwise have to incur themselves." Porter Dir. Test. at 49. Live365 "provides the bandwidth necessary for Broadcasters to reach a large number of listeners." Porter

WDT ¶ 14; *see also* Lam Dir. Test. at 21 (noting that webcasters have to pay Live365 for their bandwidth). Because those webcasters are paying Live365 for those costs, one cannot simply allocate them all to Live365's listeners, as DiMA and the Broadcasters would have it. Joint DiMA/Br. PFF ¶ 225.

173. Thus, as Dr. Brynjolfsson noted, because the broadcaster fees are being paid to cover streaming costs like bandwidth, one must either look at all of the revenues to determine streaming profitability, or allocate the costs between the revenues from webcasters who are paying Live365 to allow their listeners to access streams of sound recordings and the revenues from advertising and subscriptions. Brynjolfsson AWDT at 3 n.1. On cross-examination, Mr. Lam admitted that Live365's documents would not "give anybody a way to separate out costs attributable to the broadcasting fees from costs attributable to the advertising revenue or the subscription listener revenue," Lam Reb. Test. at 130, and he also admitted that Dr. Brynjolfsson expressly addressed this concern in his amended testimony, Lam Reb. Test. at 128-29. *See also* Brynjolfsson AWDT at 3 n.1.

174. ***Third***, DiMA and the Broadcasters also attack Dr. Brynjolfsson for critiquing Dr. Jaffe on Dr. Jaffe's failure to consider possible benchmarks other than the musical works benchmark. Joint DiMA/Br. ¶¶ 243-48. In so doing, DiMA and the Broadcasters willfully misunderstand Dr. Brynjolfsson's critique, and ignore the fact that Dr. Jaffe himself admits that he did exactly what Dr. Brynjolfsson said. Brynjolfsson WRT at 3 & n.6; Jaffe Dir. Test. at 70-71.

175. Dr. Brynjolfsson did not conduct a benchmark analysis. *See generally* Brynjolfsson WDT; Brynjolfsson AWDT; Brynjolfsson WRT. In his written rebuttal testimony

he did not argue that other markets (like ringtones) should be used as a benchmark; he argued that someone who *does* a benchmark analysis, like Dr. Jaffe did, *should* consider other benchmarks that appear to be closer than the chosen benchmark market (in Dr. Jaffe's case musical works), but Dr. Jaffe's analysis appeared simply to ignore these other possible benchmark markets. Brynjolfsson AWDT at 3 & n.6.

176. And Dr. Jaffe himself admitted that he did exactly what Dr. Brynjolfsson said he had done — Dr. Jaffe ignored those other possible benchmarks from the very beginning of his analysis:

> Q: In your initial discussions with your clients when you were engaged in this case, you concluded *from the beginning* that the easiest approach would be to work with the musical works rate that you used in the prior CARP. Right?
>
> A: Yes.
>
> . . .
>
> Q: And so from the very beginning of your engagement that benchmark, [the] musical works rate, was what you were focused on. Right?
>
> A: Yes.

177. Jaffe Dir. Test. at 70-71 (emphasis added). Later in his testimony, when Dr. Jaffe was asked about some of these possible other benchmarks, he admitted that he had not considered most of them at all, and in one case did not even know that the market existed:

> Q: Now you're aware, aren't you, that the recording industry sells sound recording rights for use [in] ringtones?
>
> A: *I've actually wondered about that.*
>
> Q: So you aren't aware of that I take it.
>
> A: I've not thought about it.

. . .

Q: Are you aware that the recording industry sells sound recording rights for use in on-demand or interactive services?

A: Yes.

Q: And you're aware that in that market the buyers of the sound recording rights have to separate acquire the rights to the musical works that are embedded in those sound recordings.

A: Yes.

Q: Are you aware that the recording industry sells rights to perform musical videos?

A: In general terms, yes.

Q: And are you aware that the buyers of those rights must separately acquire the rights to the musical works embedded in those music videos?

A: I would assume that to be the case.

Q: Okay. That's not something that you've looked at.

A: That's correct.

Q: Do you know what clip samples are?

A: Clip samples?

Q: Yes.

A: No, I'm afraid I don't.

Q: So you're not aware that the recording industry sells sound recordings in the form of clip samples?

A: I am not, no.

Q: And you're not aware that the buyers have to buy the musical work separately.

A: I don't know anything about it.

. . .

> Q: Okay. Just to be clear, the market that you're aware of where you know that there's more paid for the sound recording than the musical work is the on-demand or interactive market.
>
> A: That's correct.
>
> Q: And you weren't familiar with the other markets.
>
> A: That's correct.

Jaffe Dir. Test. at 123-27 (emphasis added).

178. ***Fourth***, DiMA and the Broadcasters claim that using 75% for the bargaining power is arbitrary and that Dr. Brynjolfsson "even concedes as much." Joint DiMA/Br. PFF ¶ 179. That is false. Dr. Brynjolfsson concluded that the record companies would definitely get more than half of the available surplus and less than 100% of the surplus. Brynjolfsson Reb. Test. at 27-28, 30-31. He had a high level of confidence that the labels would receive between "65 and 85 percent." Brynjolfsson Reb. Test. at 31; *see generally* SX PFF Section VI.B.

179. ***Fifth***, DiMA and the Broadcasters erroneously focus on statistical analyses in a situation where such an analysis would be inappropriate. *See, e.g.*, Joint DiMA/Br. PFF ¶ 209; Brynjolfsson Dir. Test. III at 137. They seem to assume incorrectly that just because a number is involved a statistical analysis should be done. This is not the case; such an analysis is only appropriate in evaluation of a broad survey. No party introduced statistical or survey data regarding the costs of advertisements.

180. ***Sixth***, The Broadcasters also claim that Dr. Brynjolfsson's "greater of" rate structure does not share risk. Broadcaster PFF ¶¶ 261-66. This claim is patently false.

181. As Dr. Brynjolfsson explained, with the "greater of" structure, Dr. Brynjolfsson proposed a *lower* per-performance rate than he would have if revenue sharing were not possible.

Brynjolfsson WDT at 4; Brynjolfsson Reb. Test. at 286. Thus, if a webcaster's actual revenues turn out to be lower than Dr. Brynjolfsson projected, the webcaster will benefit from the lower per-performance rate. Brynjolfsson Dir. Test. I at 43; Brynjolfsson Reb. Test. at 286. In turn, if the revenues were higher, the labels would share some of that upside through the percentage-of-revenue rate. Brynjolfsson Reb. Test. at 287. It is true that the rate does not "insure and insulate" the webcasters from loss; nor is it designed to do so. Brynjolfsson Dir. Test. I at 302. The per-performance rate is necessary because not all webcasters will seek to maximize their revenues, some webcasters can capture revenues in related but difficult to track ways, and some webcasters will be poorly run or have non-viable business models. Brynjolfsson WDT at 61.

182. ***Finally***, as is discussed below, DiMA and the Broadcasters essentially blame Dr. Brynjolfsson for not analyzing documents that they failed to produce during discovery. *See, e.g.*, Broadcaster PFF ¶ 275.

C. The Webcasters Repeatedly Ignore Real-World Data, Including Their Own Documents Showing That Their Revenues and Costs Have Improved Dramatically Since the 2002 CARP and Will Continue to Improve During the Statutory Period.

183. The webcasters' erroneous claim that Dr. Brynjolfsson relied on sources that he did not validate is especially ironic given that Dr. Brynjolfsson validated his results with the webcasters' own financial documents. Joint DiMA/Br. PFF Section III.C.2.b.

184. DiMA and the Broadcasters criticize Dr. Brynjolfsson for allocating banner revenues from the pages of Yahoo!'s music website to Launchcast, Yahoo!'s ad-supported webcasting service. Joint DiMA/Br. PFF ¶¶ 221-24. However, Yahoo! did not produce documents that allocated banner revenue to webcasting, or any of the services, and Mr. Roback testified that Yahoo! itself did not allocate banner advertising revenue to webcasting (even those

types of banner advertisements that Mr. Roback conceded were directly attributable to webcasting). Roback WDT at 9-10. Dr. Brynjolfsson allocated the banner revenues based on his expertise and the documents that Yahoo! actually produced. *See* SX PFF Section VII.C.4. Furthermore, under DiMA and the Broadcasters' logic, none of the banner revenues on the music homepage would be allocated to *any* music service — webcasting, music videos or anything else, even though the statutorily licensed and voluntarily licensed music services are the sole reason Yahoo! earns such revenues. Joint DiMA/Br. PFF ¶ 221. As Yahoo!'s own documents demonstrate, the bulk of Yahoo!'s advertising revenues in the music business unit come from banner advertising. SX 42 DR; Brynjolfsson WRT at 12-16.

185. Furthermore, DiMA and the Broadcasters frequently claim that Dr. Brynjolfsson relied on allegedly suspect data or techniques without citing to any evidence that the numbers in question are actually incorrect. *See, e.g.*, Joint DiMA/Br. PFF ¶ 219 (arguing that Dr. Brynjolfsson "oversimplifies and underestimates" without citation to a single source).

186. DiMA and the Broadcasters criticize Dr. Brynjolfsson's analysis, but in doing so, they ignore the real-world data that demonstrates the tremendous improvements in their costs and revenues, since the 2002 CARP and going forward through the statutory period, including data from their own webcasters.

1. DiMA and the Broadcasters' Wholesale Dismissal of Projections Is Without Merit.

187. DiMA and the Broadcasters claim, without citation to the record, that projections through 2010 are "inherently unreliable." Joint DiMA/Br. PFF ¶ 192. This claim is wrong, especially given the fact that this proceeding is intended to set rates and terms for a five-year period.

188. As demonstrated above, Dr. Brynjolfsson used standard economic practices to analyze the webcasters' projected revenues and costs.

189. Indeed, DiMA and the Broadcasters ignore the fact that their member companies (like Live365 and Yahoo!) also use projections to run their businesses and to attract investors, and that the projections Dr. Brynjolfsson used to validate his initial analysis were documents created by their members. Lam Reb. Test. at 112-13; Hanson Dir. Test. at 76-77; Roback Reb. Test. at 185-86.

190. Live365's projections (SX Ex. 23 DR) were created by Mr. Lam, Live365's CEO and a witness in this proceeding, along with Live365's senior accountant, and the document contained "the best projections that you could come up with of the future performance of the company" at that time. Lam Reb. Test. at 113. In fact, Live365's actual performance exceeded its projections for fiscal year 2006. *Compare* SX Trial Ex. 141 (FY2006-actual) *with* SX Ex. 23 DR (FY2006-projected); *see generally* SoundExchange PFF Section VII.J.

191. AccuRadio's projections (SX Ex. 37 DR) were created by Mr. Hanson, AccuRadio's founder, in November 2005, in order to show to potential investors, and Mr. Hanson characterized the pro forma as his "honest assessment of a best case scenario." Hanson Dir. Test. at 76-77.

192. Mr. Roback, Yahoo!'s witness, similarly testified that the Yahoo! projections (SX Ex. 41 DR) relied upon by Dr. Brynjolfsson were created by Yahoo! for internal business purposes, rather than litigation purposes, and are the kinds of documents that Mr. Roback uses in his daily work. Roback Reb. Test. at 185-86.

193. In their four paragraphs discussing this alleged "inherent[] unreliab[ility]," DiMA and the Broadcasters cite to statements regarding *uncertainty* regarding projections, but they do not cite to any actual facts in the record that the future projections in this case are unreliable. Joint DiMA/Br. PFF ¶¶ 194-97.

194. While agreeing with the *lawyer's* question[5] that "all other things being equal that it is much riskier to project to the future cost issues and revenue issues when you're dealing with a young immature industry than when you're looking at a mature industry in which there is a substantial track record," Dr. Brynjolfsson actually responded, "For many components of cost and revenue that's true. For some components . . . I think they're proven to be remarkabl[y] predictable despite the fact that it's a new industry. *So I don't think that's an accurate general statement.*" Brynjolfsson Dir. Test. II at 211(emphasis added).

195. Further, DiMA and the Broadcasters woefully mischaracterize Dr. Brynjolfsson's use of the Yahoo! projections. Joint DiMA/Br. PFF ¶ 227.

196. First, they claim that Dr. Brynjolfsson used the projection regarding total advertising revenues "[t]o implement his model." *Id.* That is false. Dr. Brynjolfsson testified about a Yahoo! projection regarding total advertising revenues to demonstrate the [REDACTED] that Yahoo! itself is projecting during the statutory period for its music business ([REDACTED]. SX Ex. 41 RR; Brynjolfsson AWDT at 15. In his amended testimony, Dr. Brynjolfsson clearly stated that these figures represented "total advertising revenue for [Yahoo!'s] music business.

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[5] This paragraph is one of the many examples where DiMA and the Broadcasters quote Dr. Brynjolfsson, when the actual person making the quote is counsel for DiMA or the Broadcasters. *Compare* Joint DiMA/Br. PFF ¶ 197 (citing "5/9/06 Tr. 210:21-211:7") *with* Brynjolfsson Dir. Test. II at 210-11.

Brynjolfsson AWDT at 15. That document did not break out advertising revenues by types of advertising. SX Ex. 41 DR.

197. Second, Dr. Brynjolfsson did not use *total* advertising revenue in calculating Yahoo!'s projected per listener hour revenue in 2008. Brynjolfsson AWDT at 15-16. SX Ex. 42 DR is the document that Dr. Brynjolfsson actually used for those calculations (which were not part of his model per se as DiMA and the Broadcasters appear to claim). Brynjolfsson AWDT at 15-16. That document — which Yahoo! appears to have provided to Dr. Jaffe and produced in response to requests for documents related to his testimony, as it is Bates numbered CRB-JAF— contains projections only through 2008, but those projections are broken out by type of advertising; thus, the numbers used by Dr. Brynjolfsson were just for in-stream ads, banner ads, and sponsorships, and not for total advertising as DiMA and the Broadcasters claim. SX Ex. 42 DR; Brynjolfsson AWDT at 15-16; Joint DiMA/Br. PFF ¶ 227.

198. In SX Ex. 42 DR, Yahoo! projects that its in-stream advertising revenue alone will [REDACTED]. In addition, Yahoo! projects that banner advertisements will [REDACTED], while sponsorships [REDACTED]. SX Ex. 42 DR. In addition, by the time that Mr. Roback testified in June 2006, Yahoo! had increased the number of ad breaks it had each hour to 10 from the 3 per hour it had been selling in October 2005. Roback Dir. Test. at 166; Roback WDT at 10-11.

199. Finally, DiMA and the Broadcasters claim that Dr. Brynjolfsson's reliance on projections about *advertising revenues* in SX Ex. 41 DR is unwarranted because Yahoo!'s *total revenues* have apparently not met their projections; however, the total revenues in SX Ex. 41 DR

include Musicmatch revenue, search revenue, download revenue, and on-demand subscription revenue, among other things. SX Ex. 41 DR; Joint DiMA/Br. PFF ¶ 277; Roback WRT ¶ 16(b).

200. Notably, neither Mr. Roback nor DiMA and the Broadcasters submitted evidence regarding how Yahoo!'s actual advertising revenues compared with its projections. The sole evidence is Mr. Roback's testimony that webcast advertising had seen "tremendous growth" from 2004 to 2005, Roback WDT at 8, and that growth had continued into 2006. Roback WRT at 17.

201. Webcasters' entire case is geared toward hoping the Judges will not focus on the future — or even the present — and look only at 2004, when the market for webcast advertising was beginning to take off into a period of "tremendous growth." Roback WDT at 8. As Dr. Brynjolfsson made clear, such a focus is wholly unreasonable. Brynjolfsson WRT at 18126-36. Moreover, the evidence in the record demonstrates convincingly that webcasters are earning more and more revenue and that trend seems certain to continue into the future. Willing buyers and willing sellers would take account of these facts in any negotiation.

2. The Webcasters' Witnesses Did Not Know Anything About Their Own Financial Documents.

202. DiMA and the Broadcasters' critique of Dr. Brynjolfsson's analysis of their financial documents is especially ironic given that their own witnesses could not sensibly testify about their own financial documents during the hearing. *See generally* SX PFF Section VII.K.

203. For example, Mr. Silber, Microsoft's witness, testified not only that he had never seen Microsoft's costs and revenues figures for its webcasting product, but that he did not know how the figures *in his own testimony* were calculated. Silber Dir. Test. at 62-66, 110-11. He

ultimately admitted that he did not even know whether Microsoft's webcasting product lost money as he claimed in his written statement. Silber Dir. Test. at 110.

204. Nonetheless, DiMA cited the figures from Mr. Silber's written direct testimony in its proposed findings of fact as if Mr. Silber had never admitted that he had no knowledge how the figures in his own testimony were calculated. DiMA PFF ¶ 14.

205. Similarly, Mr. Halyburton from Susquehanna testified that he had not seen financial documents produced by Susquehanna in discovery and said, "I'm not really sure because I never saw any — any numbers. And frankly as the year went on, I saw less and less on expenses or anything else." Halyburton Dir. Test. at 115-20.

206. Nor were Mr. Silber and Mr. Halyburton the only DiMA and Broadcaster witnesses who did not know anything about their own financial documents. *See, e.g.*, Coryell Dir. Test. at 123-24, 130-33, 181, 185-86; Roback Dir. Test. at 271-73; Parsons Dir. Test. at 111-15; 184-94.

207. The financial testimony, both written and oral, of each of these witnesses is not credible and should be given absolutely no weight. Moreover, it seems calculated once again to obscure the present reality of streaming — the huge increases in advertising from 2004 to 2005 and the encouraging projections of the bosses of the people who testified before the Judges. Halyburton Dir. Test. at 115-20; Parsons Dir. Test. at 111-15; 184-94. Indeed, DiMA and Broadcasters' strategy appears to have been to put blinders on their witnesses so that they would not know too much about the present, or their company's own upbeat projections. The Court should take notice of this lack of credibility.

3. Webcasters Are Entering the Market In Droves.

208. The undisputed evidence in the record supports Dr. Brynjolfsson's conclusions that webcasters are entering the market in droves under the current rate, despite what DiMA and the Broadcasters claim. Brynjolfsson WRT at 22-25.

209. DiMA's discussion of the drop in the number of webcasters on Live365 after Live365 began charging a monthly fee is another example of DiMA blithely ignoring evidence about the current state of the market in favor of its past impressions. DiMA PFF ¶ 22. As Dr. Brynjolfsson explained, it is hardly a surprise that some webcasters who entered the market when it was effectively free — because no royalty has been set — left the market when the royalties were set. Brynjolfsson WRT at 17-18.

210. What DiMA fails to mention in that paragraph, and what is indisputable based on the evidence in the record, is that since that time, the number of webcasters on Live365 has *increased.* Porter Dir. Test. at 51; Lam Reb. Test. at 76; Lam WDT ¶¶ 4, 8-9. In fact, it has approximately *doubled* to "roughly 10,000 stations." Porter Dir. Test. at 51. Thus, approximately 5,000 more webcasting stations have entered the market through Live365 alone since the time of the last CARP than have ceased webcasting on Live365. Porter Dir. Test. at 51; Lam Reb. Test. at 76; Lam WDT ¶¶ 4, 8-9.

211. Similarly, there was an 87% increase in the percentage of over-the-air radio stations in the top 51 markets that simulcast between October 2005, when the written direct testimony was filed, and September 2006, when the written rebuttal testimony was filed. Brynjolfsson WRT at 23-24 & Table 1. The number of actual stations streaming in those markets increased over 100% in the same time period, from 625 to 1,256, with an even greater

increase (almost 120%) in the number of FM stations that stream. Brynjolfsson WRT at 23-24 & Table 1; *see generally* SX PFF Section VII.B.

212. Indeed, the Broadcasters acknowledge the dramatic growth since they filed their initial written testimony by explicitly relying on Dr. Brynjolfsson's evidence regarding market entry by simulcasters in several places in their own findings of fact. Broadcaster PFF ¶¶ 286, 308.

4. Dr. Jaffe Criticizes Dr. Brynjolfsson for Using Real-World Data.

213. Dr. Jaffe, and DiMA and the Broadcasters, actually criticize Dr. Brynjolfsson for using real-world data with respect to the cost of the musical works rights to webcasters. Joint DiMA/Br. PFF ¶ 65.

214. In the current real-world market, the cost of musical works is a known factor, just like there is a market price for bandwidth. Brynjolfsson Reb. Test. at 33-34; Brynjolfsson WRT at 8. Therefore, in his models, Dr. Brynjolfsson used the webcasters' *actual* costs for musical works, and he testified that those costs were set exogenously (in other words, separately from the price of sound recordings). Brynjolfsson Reb. Test. at 33-34.

215. Dr. Jaffe's criticism is a pattern in his testimony wherein rather than conforming his theories to fit the facts, he ignores real-world evidence that does not fit with his theories. *See* Jaffe WDT at 32-34 & n.30 (discussing SESAC).

5. Having Failed to Prove Their Initial Claims of Poverty, the Broadcasters Now Claim That Their Financial Condition Is Irrelevant.

216. Incredibly, the Broadcasters now claim—with absolutely no evidentiary support—that "[b]ecause the profitability of the licensees bears no relationship to the value of the sound recording performance right, it is inappropriate to use it as a guidepost in setting the royalty rate." Broadcaster PFF ¶ 267.

217. Furthermore, when the Broadcasters then allege that they are losing money, Broadcaster PFF ¶¶ 271-84, they for the most part ignore their financial documents which were produced during discovery and analyzed by Dr. Brynjolfsson; instead of dealing with the most up-to-date, actual numbers on costs and revenues, they cite to initial written testimony and vague statements about losing money. *See, e.g.*, Broadcaster PFF ¶ 271 (citing Broadcasters' WDT), 278 (citing RBX 10).

218. Indeed, the Broadcasters claim—again without citation to the record—that the "evidence shows that, in general, costs still exceed revenues, and that SoundExchange royalties make up a disproportionate share of the costs." Broadcaster PFF ¶ 272. In that entire section, Section X.C, the Broadcasters do not cite to any documents containing actual financial data except for a citation to a document created for this litigation (RBX 10), Coryell Dir. Test. at 105, that was filed as part of the Broadcasters' written direct case, and a citation to SX Ex. 19 RR showing that [REDACTED] of the Clear Channel *markets* where Clear Channel stations are streaming [REDACTED]. Instead, the Broadcasters rely on general statements by their witnesses. Broadcaster PFF Section X.C. In addition, although RBX 10 showed that only [REDACTED] of [REDACTED] streaming stations were profitable at the end of the first six months of 2005, by the time Mr. Coryell testified in person, *all* of the remaining stations

([REDACTED] according to RBX 10) had begun streaming, and [REDACTED] were music stations. Coryell Dir. Test. at 16-19; Coryell WDT ¶ 7.

219. In addition, the Broadcasters improperly attempt to assert facts that are not in evidence regarding SX Ex. 19 RR. Broadcaster PFF ¶ 281. The Broadcasters claim that the revenues in SX Ex. 19 RR "do not reflect ad commission expense information." Broadcaster PFF ¶ 281. They do not cite to the record for that baldly improper assertion, and indeed, there is absolutely no evidence in the record that the streaming revenues in SX Ex. 19 RR are gross revenues rather than net revenues or that the ad commission expenses are not included in the streaming expense figures in that same exhibit.

220. The Broadcasters also completely mischaracterize Dr. Brynjolfsson's testimony, falsely claiming that he "admitted that Susquehanna has continued to incur a "loss" in their streaming operations." Broadcaster PFF ¶ 280 (citing Brynjolfsson WRT at 30). The Broadcasters' statements stand Dr. Brynjolfsson's testimony on its head. Dr. Brynjolfsson testified that Susquehanna claimed to be losing money in its written direct testimony, and then he stated quite clearly: "*Even if those numbers reflected the market today*, they would show that the 'loss' from streaming is [REDACTED] and likely more than offset by the overall value to Susquehanna of streaming." Brynjolfsson WRT at 30 (emphasis added). Dr. Brynjolfsson went on to testify that Susquehanna's documents appear to show that its streaming revenues in fact [REDACTED]. Brynjolfsson WRT at 30 (citing SX Ex. 21 RR).

221. The evidence in the record is clear. Streaming revenues are increasing. SX Trial Ex. 141; SX Ex. 18 RR; SX Ex. 19 RR; SX Ex. 21 RR; Roback Dir. Test. at 238-39; *see generally* SoundExchange PFF Section VII.C, E, F. Yahoo!'s in-stream advertising revenues per

listener hour alone (only a portion of its webcasting revenues) [REDACTED]. Roback Dir. Test. at 238-39; Brynjolfsson AWDT at 14.

222. Clear Channel was one of the only companies to produce clearly comparable revenues and expenses documents during discovery—although as Mr. Parsons admitted, those revenues may not reflect the total streaming revenues even by Clear Channel's definition of revenues because the local markets determine how, and whether, to allocate certain revenues to streaming. Parsons Dir. Test. at 81-99; *see generally* SX PFF Section VII.I.2. Furthermore, [REDACTED] of the top 25 [REDACTED] made [REDACTED]. Parsons Dir. Test. at 115-17, 122; SX Trial Ex. 97; SX Ex. 19 RR; Brynjolfsson WRT at 34; Radio Broadcasters' Opposition to Motion to Compel filed by SoundExchange at 9-10 (filed March 15, 2006) (identifying documents Dr. Brynjolfsson relied upon as responsive to SoundExchange requests for documents on costs and revenues of streaming).

223. Nonetheless, Clear Channel made [REDACTED]. SX Ex. 19 RR; Brynjolfsson WRT at 32 & Figure 7.

224. Similarly, from fiscal year 2002 through fiscal year 2006, Live365's advertising revenues have [REDACTED], and Live365 [REDACTED]. SX Ex. 23 DR; SX Trial Ex. 141; Porter Dir. Test. at 71 (admitting that Live365 had "touched on profitability").

225. Revenues from subscription services—which are [REDACTED], SX Ex. 29 DR, Roback Dir. Test. at 182-83, Porter Dir. Test. at 63, 125—have also [REDACTED] tremendously. SX Ex. 23 DR; SX Trial Ex. 141; Brynjolfsson AWDT at 14; *see generally* SX PFF Section VII.E. Indeed, documents produced by Yahoo! demonstrate that, because of the

low statutory rate that has been in effect, subscription radio is the highest margin of their digital services — by far. SX Trial Ex. 158 at CRB-YAH-R-000044.

226. At the same time, the evidence in the record is equally clear that bandwidth costs have plummeted since the 2002 CARP. SX Ex. 23 DR; SX Ex. 24 DR; SX Trial Ex. 100; SX Trial Ex. 101; Parsons Dir. Test. at 136-345; *see generally* SX PFF Section VII.D.

227. The Broadcasters' arguments that Dr. Brynjolfsson did not consider streaming costs when he considered streaming revenues are part of a repeated blame-the-victim strategy. *See, e.g.*, Broadcaster PFF ¶¶ 275, 278. Despite requests for documents regarding streaming expenses, neither Susquehanna nor Bonneville produced documents on the streaming expenses for all of their stations. Brynjolfsson WRT at 28, 30-31; Broadcaster PFF ¶ 278 (noting that Dr. Brynjolfsson "obtained revenue (but not expense) information"). The Broadcasters blame Dr. Brynjolfsson for not analyzing something that *they* failed to produce. The one instance where the Broadcasters produced both streaming revenues and streaming expenses demonstrated that [REDACTED] from streaming in 2005. SX Ex. 19 RR.

228. Finally, the Broadcasters' argument that it is somehow improper for this Court to consider the revenues and costs of the simulcasters participating in this proceeding without evidence regarding all simulcasters is both without precedent or merit. Broadcaster PFF Section X.D. Broadcasters have come to this proceeding purporting to represent the whole industry, proposing rates to govern all simulcasters, based on agreements entered into by all broadcasters, with testimony from Mr. Meehan of the Radio Music Licensing Committee, which represents all broadcasters. They have provided testimony purporting to be typical of simulcasters, and now argue that all of it should be ignored.

229. This Court can only consider evidence in the record in this proceeding, and that evidence demonstrates clearly that each of the simulcasters' revenues have [REDACTED] and that [REDACTED]. SX Ex. 18 RR; SX Ex. 19 RR; SX Ex. 21 RR. Furthermore, Dr. Brynjolfsson's models, which were constructed based on publicly available data about the webcasting industry as a whole, and which were validated by the webcasters' own documents, are generally applicable to the webcasting industry and provide ample evidentiary support for a significant increase in the royalty rate. Brynjolfsson WDT at 2-4. By contrast, all told, both DiMA and the Broadcasters refer to their own costs and revenues only in a handful of paragraphs in their respective proposed findings of fact.

V. THE SERVICES HAVE FAILED TO PRESENT ANY EVIDENCE QUANTIFYING AN ALLEGED NET PROMOTIONAL EFFECT OF STATUTORY WEBCASTING ON RECORD SALES.

230. The Services insist that noninteractive statutory webcasting is promotional. DiMA PFF Section VII; Broadcaster PFF Section IV; SCW PFF ¶¶ 7-15; IBS PFF Section IV; NPR PFF Section IV. But the Services have failed to present any evidence in the record that quantifies the net promotional effect of statutory webcasting on record sales. SX PFF Section IX.D. As discussed in detail in SoundExchange's PFF Section IX, for multiple reasons, the Services' arguments about promotion provide no basis to adjust rates and terms for the statutory license.

231. Indeed, when asked point-blank about whether they could quantify the net promotional effect of webcasting, the Services' witnesses admitted that they could not. SX PFF Section IX.D.2.a. In the absence of any such evidence, the Judges should not credit the Services "guesses" and "speculat[ion]." Frank Reb. Test. at 278.

232. Apparently recognizing that merely playing recordings on webcasting services itself is not promotional, DiMA cites anecdotal testimony from its witnesses that webcasters' voluntary "testing" of recordings for record companies is an important promotional tool. DiMA PFF ¶¶ 87-89. The value of that testing, however, is not relevant to the Judges' assessment of whether noninteractive webcasting is promotional. As DiMA's witnesses readily acknowledge, webcasters are not required by the statutory license to "test" recordings for record companies; whatever testing they do is on a purely voluntary basis — something they give to record companies as pay back for the content and other things that Yahoo! and AOL receive. Frank Reb. Test. at 283-84; Isquith Reb. Test. at 188-90. There is no reason to adjust the statutory license based on features that are outside the scope of the statutory license. Webcaster I CARP Report at 110.

233. Moreover, the webcasters derive benefits from the testing of recordings. Frank Reb. Test. at 285-87; Isquith Reb. Test. at 189-90.

234. The Broadcasters spend a great deal of time arguing that over-the-air radio is promotional and therefore that simulcasting is promotional. Broadcaster PFF Section IV. But their claims suffer from the same flaws as those of Internet-only webcasters. The Broadcasters have presented no evidence —other than mere assertions — about the promotional benefit of over-the-air broadcasting and no evidence to support the claim that streaming's promotional or substitutional effect is identical to that over over-the-air broadcasting. Although the Broadcasters acknowledge that "[i]t goes without saying that . . . anecdotal and subjective beliefs without more, cannot form the basis of a determination of the actual facts influencing a competitive market," *see* Broadcaster PFF ¶ 97, that is all they offer for their claims about promotion.

235. Nor do they make any effort to quantify possible substitution at all.

236. On a similar record, the Librarian found that there was no basis to distinguish between simulcasters and Internet-only webcasters, because the simulcasters failed to provide any quantifiable evidence of a promotional/substitutional effect from simulcasting, as distinct from over-the-air broadcasting or different from Internet-only streaming. Librarian's Decision at 45255. The same reasoning holds true here.

237. Having failed to develop empirical evidence in their case, the Broadcasters resort in their findings to a Rube-Goldberg calculation of the "value" that sound recording copyright owners receive from over-the-air radio each year, estimating it at $600 million, based on no expert or other testimony, but merely on extrapolating from the percentage of expenses that one record company spends on various promotional activities. Broadcaster PFF ¶¶ 58-68. Besides being wholly unsupported by witness testimony or expert analysis, the calculation itself is both absurd and unconnected to streaming — an activity on which the evidence shows record companies spend little to promote airplay. Kushner WDT at 10-11 ("our company does not generally expend resources on promotion of our music to internet radio").

238. The sole empirical data to which the Broadcasters point for the impact of streaming on sales of CDs is an Arbitron study that did not consider causation, *i.e.*, whether streaming causes people to buy more CDs or whether those who were early streamers are simply music lovers, and indeed found that those who stream music also see twice as many movies as others — even though there is no basis for concluding that streaming is promotional for movie ticket sales. Hanson Dir. Test. at 113-15 (conceding no causal effect); SX Trial Ex. 133.

239. Similarly, NPR suggests that its statutory webcasting is promotional based on undocumented anecdotal evidence that appearances by artists on NPR's programming, NPR "commentaries" about musicians, and NPR "interviews" of musicians have increased sales of those artists' recordings. NPR PFF ¶¶ 40, 56, 60. That argument is unpersuasive. Neither NPR nor any other webcaster presented any evidence that plays of a recording (as opposed to programming such as commentaries and interviews) actually leads to increased sales. The programming touted by NPR is outside the scope of the statutory license, and there is thus no basis to adjust the license rate for it. Webcaster I CARP Report at 110.

240. The Services also maintain that the "buy buttons" provided by some webcasters promote record sales. DiMA PFF ¶ 92; SCW PFF ¶¶ 9-11. But as discussed in SoundExchange's findings, the evidence in the record shows virtually no promotional effect from webcasting. SX PFF Section IX.D.1. Certainly the grossly unscientific "survey" by AccuRadio cited at SCW PFF ¶ 11 does not prove any such effect. Broadcasters cite to testimony concerning sales by KDFC, Bonneville's classical station in San Francisco, but there is nothing in the record to show that those sales are related to streaming as distinct from the download store available on KDFC and the reflect shows that KDFC extensively markets on its website a CD ("Islands of Sanity") it produces itself, separate and apart from streaming, and that these sales are what give KDFC a "good bump" in sales at year end (when a substantial of KDFC's sales occur). Coryell Dir. Test. at 244-46.

241. Finally, the Services try to cite SoundExchange's artist witnesses' testimony to support the Services' promotional argument. But they achieve this result only through egregious distortions of the evidence in the record.

242. To pick just one of many examples, NPR contends that "Ms. Fink" streams recordings on her website because, in NPR's words, she believes that "webcasting is in itself promotional." NPR PFF ¶ 59. Nothing could be further from the truth. As an initial matter, NPR misidentifies the witness testimony. Although repeatedly referring to "Ms. Fink," NPR in fact is referring to the testimony of Ms. Brooke. But that is the least of NPR's errors. More significantly, NPR completely misrepresents what Ms. Brooke actually said. When asked on cross-examination (on the very pages of the transcript cited by NPR) why she had made streams of her music available on her own web site, Ms. Brooke answered that "I was hoping" it would lead to sales. Brooke Dir. Test. at 157. She explained, however, that since she started making streams available "I have witnessed a real drop in sales, actually, on my website. It's pretty much 50 percent of what it was on the last record since I started streaming." Brooke Dir. Test. at 157. *See also* Brooke WDT at 8. Thus, the evidence cited by NPR simply does not support NPR's position.

VI. THERE IS NO BASIS FOR A DIFFERENT RATE FOR SIMULCASTERS.

243. Most of the arguments made by the Broadcasters are identical to those made by all of the other webcasters. Nonetheless, the Broadcasters' attempt to distinguish themselves from Internet-only webcasters deserves brief attention. As the record demonstrates, there is no basis for a different rate for simulcasters, as opposed to Internet-only stations. This same conclusion was reached by the Librarian in the last proceeding, *see* SX Ex. 407 DP at 45255 (Librarian's Decision), and Radio Broadcasters have produced no persuasive evidence to change that conclusion. Indeed, the record evidence demonstrates that the activities of simulcasters and Internet-only webcasters continue to converge. Griffin WRT at 6; Griffin Reb. Test. at 276; SX PFF Section XI.

A. Simulcasters and Internet-Only Webcasters Compete with Each Other for Advertising and Audience.

244. SoundExchange detailed the evidence that Broadcasters and Internet-only Webcasters cannot be distinguished from each other under the willing buyer/willing seller standard. SX PFF Section XI; Brynjolfsson WRT at 19-20.

- Simulcasters sell advertising together with Internet-only webcasters, rendering any difference irrelevant from the perspective of the willing buyer/willing seller standard. SX Ex. 211 RP; Brynjolfsson WRT at 19; Griffin WRT at 11-12.
- Simulcasters themselves concede that they are competing directly with Internet-only webcasters, and Internet-only webcasters concede that they are competing with simulcasters. Griffin WRT at 12; SX Ex. 221 RP (RAIN Newsletter, 9/27/2006); Potter Dir. Test. at 184-86; Roback Reb. Test. at 388-89.
- Simulcasting allows webcasters to transmit their programming where it could not reach, such as office buildings, and beyond the geographic limits of their signal, which is increasingly becoming part of Broadcasters' strategy. Coryell Dir. Test. at 155; SX Trial Ex. 86 at 4; Griffin Reb. Test. at 36; Griffin Reb. Test. at 52. Clear Channel, for example, is offering one its stations via cellular phones for a monthly subscription fee of $.99 per month. Griffin WRT at 11; SX Ex. 220 RP (RAIN Newsletter, 9/7/2006).
- Internet-only radio service was designed precisely to mimic over-the-air broadcasts. Griffin WDT at 56.

245. Indeed, the record reflects that simulcasters have all the same benefits as Internet-only webcasters in the free market — they can, as they do, aggregate their advertising on a national level — but also have the advantages of a potential lower cost structure and better access to the local ad market. Brynjolfsson WRT at 19-21. There is thus no reason for simulcasts to be given with a lower rate.

246. The unsurprising conclusion that simulcasters and Internet-only webcasters cannot be distinguished is also consistent with the legislative history of the DMCA and the decisions of the Copyright Office and the United States Court of Appeal for the Third Circuit,

which rejected the very same arguments that the Broadcasters make here. SX Reply Conc. Section II.

B. Broadcasters' Claim That Webcasting Is Ancillary to Their Business Provides No Basis for a Discount and Is Increasingly Untrue.

247. The Broadcasters' arguments about the ancillary nature of streaming to their business, see Broadcaster PFF ¶¶ 18-23, is belied by the sharply increasing revenues Broadcasters are earning *see* SX PFF Section VII.C.3, the statements of the Broadcasters themselves about the incredible market opportunity that the Internet and streaming in particular provides, *see* SX PFF Section VII.H, and the actions of the simulcasters in this proceeding, all of whom are streaming all of their stations or investing heavily in increased streaming. SX PFF Section VII.B.2.

248. Indeed, Clear Channel's own documents reveal that they themselves rely on Accustream data from similar reports in Clear Channel sales training presentations, encouraging its sales people to rely on Accustream data when speaking to customers about the value of streaming. SX Trial Ex. 112, at CC0006879; Parsons Dir. Test at 221-29.

C. Broadcasters Cannot Be Distinguished from Webcasters Based on Music Use.

249. The Broadcasters' argument that they should be distinguished from Internet-only webcasters based on music usage is particularly ironic, given that the Broadcasters propose a rate that is unconnected in any way to music usage. Broadcaster PFF Section XI. The Broadcasters have presented no evidence about their music usage at all (including no evidence about how many songs per hour they play), relying only on arguments from 2001 about their music usage at that time. Broadcaster PFF ¶ 198.

250. Moreover, to the extent that the CRJs establish a sound recording royalty rate based in part on a per performance rate, any differences in music usage will be accounted for by lower payments for webcasters, of whatever kind, that play fewer sound recordings per hour. Indeed, this is one reason why SoundExchange proposed only a per performance rate in its Revised Rate Proposal. *See* SoundExchange's Revised Rate Proposal (filed Sept. 29, 2006).

VII. ON THIS RECORD, THE RELATIVE CONTRIBUTION FACTOR FALLS DECIDEDLY ON THE SIDE OF THE RECORD COMPANIES.

251. DiMA and the Broadcasters' entire argument about the relative contribution of webcasters and sound recording copyright owners is that the Judges must discount all of the creative and financial efforts undertaken by record companies and performers because such efforts also allow record companies and performers to earn revenues from other revenue streams. Broadcaster PFF ¶¶ 103-07. As discussed in SoundExchange's Reply Conclusions of Law, that argument is contrary to law.

252. Once the proper legal standard is applied, the record evidence demonstrates that this second factor strongly supports copyright owners and performers. Despite their lengthy assertions about contributions from webcasters (*e.g.*, Broadcaster PFF ¶¶ 108-38; DiMA PFF ¶¶ 106-120), the record falls decidedly in favor of the record companies and performers who create the sound recordings that are the foundation of webcasters' businesses.

253. The Broadcasters, for example, tout investments in streaming, but have submitted almost no empirical or financial evidence of their overall costs of streaming, except for financial claims by Mr. Coryell, Mr. Halyburton, and Mr. Parsons that the record reflects are without foundation and not within each witness's own knowledge. SX PFF Section VII.K.

254. Similarly, the Broadcasters put on no evidence from a DJ or other radio station personnel to support their claims concerning "added value" or to make concrete their claims that programming is more essential than the sound recordings themselves. Noncommercial Broadcasters' arguments are all but identical — simply adopting the same claims made by Broadcasters, and fail for the same reason. Joint Noncomm. PFF ¶ 48.

255. On this record, there is no financial evidence to support webcasters' claims of a significant contribution and no direct evidence of any "creative" contribution at all.

256. DiMA's arguments concerning their contribution provide slightly more financial information, but little of relevance. Yahoo! points to money spent by a predecessor — Launch — in 1999-2000 to develop Launch's non-statutory custom radio product as evidence of investment, but such investments are for a service other than a statutory service. Moreover, Yahoo! itself spent a small fraction of that amount to acquire Launch. Roback Reb. Test. at 151. And Yahoo! cannot break out today how much Yahoo! spends on webcasting. Roback Reb. Test. at 191-93. Indeed, Mr. Roback testified that "there aren't many people who work exclusively on Launch." Roback Reb. Test. at 192-93. Mr. Lam of Live 365 touts [REDACTED] in investment from Live365, but, given that Live365 operates some 10,000 different webcasters, that investment turns out to be modest on an webcaster-by-webcaster basis. DiMA PFF ¶ 113. AOL specifies its investment in webcasting for one year, DiMA PFF ¶ 114, but must concede that half of its webcast hours are devoted to subscribers to its Internet access service, for which it attributes no revenue to the webcasting business (despite the monthly fees of $14.99 and up per month) and for which webcasting is a key customer retention tool. Winston Dir. Test. at 175-79.

257. DiMA also claims an exodus from the webcasting industry, without mentioning the exodus is several years old (and related to first having to pay any sound recording royalties at all) and that webcasters are jumping into the market now. SX PFF Section VII.B. Moreover, as Dr. Brynjolfsson explained, it is hardly surprising that webcasters left the market after the Internet bubble burst and they also had to start paying royalties (some webcasters believing they would always be able to stream for free). But the rebound in the market shows that, in 2006, webcasters are finding this to be a promising and lucrative market. Brynjolfsson WRT at 17-25.

258. Indeed, the evidence in the record about the investment in webcasting demonstrates unequivocally that webcasting requires no particular technical expertise, the investment is small, and it is declining. Brynjolfsson WDT at 12. To start webcasting takes less than $100. Griffin Dir. Test. at 194-95. One can pay any of a number of off-the-shelf providers to do all of the work and be up and running in a day. Griffin WDT at 24. And, even on a significant scale, webcasting is inexpensive. AccuRadio, a webcaster with 900,000 listeners each month, started with about $50,000 of his own money — no bank loans and no venture capital, and has "de minimis" capital expenses. Hanson Dir. Test. at 71-73.

259. Further, the only other significant cost (besides royalties) is bandwidth, and that cost is declining rapidly. SX PFF Section VII.D.

260. For simulcasters, these costs are even less and rapidly declining. Clear Channel admits that costs declined [REDACTED] from 2002 to 2004. SX Ex. 24 DR; SX Trial Ex. 100; Parsons Dir. Test. at 136-37. Indeed, some Broadcasters have admitted that webcasting has no impact at all on their costs. Johnson Dir. Test. at 314-16. To the extent that "marginal" contributions are what is relevant (as noted above, that is not, however, consistent with the

statute), Broadcasters of all kinds make no marginal contribution because they are simply retransmitting what they are otherwise doing.

261. In contrast, the record presents overwhelming evidence of the creative, technical, and financial contributions of record companies in the creation and marketing of copyrighted works. SX PFF Section X.

- Mr. Kushner provided a detailed discussion of the creative efforts of record companies, as well as the financial investment. *See generally* Kushner WDT.
- Mr. Ciongoli presented detailed evidence of the enormous investments that record companies make in the creation and marketing of sound recordings and showing the high risk nature of the recording industry. *See generally* Ciongoli WRT. Other evidence in the record confirms such costs for other record companies. Services Ex. 118 (WMG financial statements).
- Mr. Iglauer provided the perspective of independent record companies, the risks that they face, as well as the efforts they make to bring sound recordings to the public. *See generally* Iglauer WDT.
- And SoundExchange also presented testimony from three artists, who provided real and direct testimony about their creative endeavors, the blood, sweat, and tears that go into making sound recordings, as well as the personal financial investments and risk. *See generally* Bradley WDT; Fink WDT; Brooke WDT.

262. Webcasters attempt to minimize the creative contributions of performers and/or to suggest that all of the work goes into the musical work, rather than the sound recording. But without the work of performers, webcasters would have no product to sell. As Harold Bradley explained, the work of the recording musicians has "everything to do" with whether a song is a hit, and everything to do with the value webcasters can gain from it. Bradley Dir. Test. at 172.

263. Webcasters themselves provide no evidence of any creative or technical innovation that they provide to webcasting. Merely stating that they program music, whether by a human being or through a computer, tells little or nothing about any creative or other aspect of

such efforts, especially without testimony from someone who actually does those activities or some quantification of the investment made. And whatever those contributions, they cannot rival the creative contributions of the artists and performers who make webcasting possible or the financial contributions of the record companies that bring the sound recordings that are used by webcasters to market.

VIII. NONCOMMERCIAL STATIONS HAVE FAILED TO PROVIDE ANY PERSUASIVE EVIDENCE THAT THEY ARE ENTITLED TO A DISCOUNTED RATE UNDER THE WILLING BUYER/WILLING SELLER STANDARD.

264. Noncommercial stations' primary argument is that they are "different" and thus that they are entitled, under the willing buyer/willing seller standard, to a lower rate. To support this argument, they make both legal and factual arguments. As discussed in SoundExchange's Reply Conclusions of Law, noncommercial stations' legal arguments are policy arguments in disguise and must be rejected as such.

265. As discussed below, noncommercial stations' factual arguments do not support their claim that they would receive a lower rate in marketplace negotiations in the absence of a compulsory license.

A. Noncommercial Stations' Arguments Are Contradictory.

266. As an initial matter, Noncommercial Broadcasters[6] make entirely contradictory arguments in their proposed findings. In one place, they argue that "neither the size of a budget nor the size of a listening audience nor the scope of a station's efforts to earn revenues to keep afloat are relevant to the factors that entitle noncommercial licensees to a separate rate." Joint Noncomm. PFF ¶ 64. At the same time, they argue that they are entitled to lower rates because

[6] "Noncommercial Broadcasters" refers to the group of noncommercial station participants that filed Joint Proposed Findings of Fact and Conclusions of Law ("Joint Noncomm. PFF").

they "have different sources of funding," Joint Noncomm. PFF ¶¶ 20-23, and "[i]t is beyond dispute that services such as Noncommercial Broadcasters that use less music should pay less in sound recording performance royalties." Joint Noncomm. PFF ¶ 30.

267. This contradiction simply highlights the fundamental flaw in all of the noncommercial stations' cases. They argue for one-size-fits-all flat fees, even though some noncommercial stations (and perhaps many) are not small and even though, on a usage metric, small noncommercial stations would pay very little money under SoundExchange's proposal. SX PFF Section XI.E-G.

B. The Different Mission of Noncommercial Stations Does Not Compel a Lower Rate.

268. Much of the evidence submitted by the noncommercial stations and their proposed findings focus on their claim that they are "different" because of their mission. In their view, under the willing buyer/willing seller standard, the various non-financial motives of noncommercial stations and the multiple revenue streams that are distinct from the marketplace, *e.g.*, government grants and university subsidies, mean that, in a free market, they would pay less than an entity with a commercial motive. Joint Noncomm. PFF ¶¶ 11-14.

269. Time and again, noncommercial webcasters testified that the decision to stream was not financially driven. Mr. Stern explained that NPR's decision to stream is not a "financially driven decision." Stern Dir. Test. at 290-91. Mr. Johnson testified that his station had few listeners and that streaming had no impact on its costs or its revenues. Johnson Dir. Test. 221-24, 314-16. He also conceded that he has never asked anyone to underwrite or sponsor his stream. Johnson Dir. Test. at 207-08. Noncommercial Broadcasters go so far as to claim that noncommercial stations "operate outside the competitive market." Joint Noncomm. PFF at ¶ 14.

270. But the argument that noncommercial stations do not approach streaming as an economic proposition is not a basis for a lower rate. Indeed, it is evidence that demonstrates, precisely as Dr. Brynjolfsson explained, that small noncommercial stations would have to accept the fair market value that the marketplace establishes. As Dr. Brynjolfsson explained, prices in the market are not determined by people with non-economic motives. Brynjolfsson WRT at 40. Rather, noncommercial entities that choose to pursue their mission, whether it is educational, religious, or otherwise, must pay whatever the market price is in order to pursue those goals. Indeed, NPR's findings make this clear. NPR concedes that it pays "market rates for its costs," even though it is unable to advertise with the same freedom as commercial stations and has some different motivations. NPR PFF ¶ 10.

271. As discussed in more detail in SoundExchange's Conclusions of Law, the different mission of noncommercial stations has no place in the willing buyer/willing seller standard. Rather, it is a naked appeal for the Court to substitute a policy decision to discount fees for noncommercial stations from the fair market value required by the statute. Lacking evidence demonstrating that sound recording copyright owners and noncommercial stations would reach a different rate absent a compulsory license, noncommercial stations' mission provides no basis for a lower rate.

C. The Economic Evidence in the Record Does Not Support Noncommercial Stations' Request for a Lower Rate or a Flat Fee.

1. Noncommercial Stations Did Not Make a Record to Support Their Rate Proposals.

272. Noncommercial Stations claim that their different economics and funding sources justify lower, flat fees for them. Joint Noncomm. PFF ¶¶ 20-25. But Noncommercial

Broadcasters introduced virtually no evidence in the record about their economics to support those arguments.

273. Noncommercial Broadcasters criticize Dr. Brynjolfsson for discussing in testimony the economics of 5 "atypical" noncommercial stations in his discussion of noncommercial stations. Joint Noncomm. PFF ¶¶ 57-70. But by analyzing and providing evidence on 5 stations, Dr. Brynjolfsson did far more than any of the noncommercial services did themselves in terms of putting before the Judges evidence concerning the economics of noncommercial stations.

274. For example, NPR introduced no evidence whatsoever about its revenues or the revenues of its member stations. Mr. Stern testified about NPR.org, but not about the 800 NPR stations that form part of NPR's rate proposal.

- Mr. Stern was not even sure how many stations and websites, in total, were covered by NPR's flat fee rate proposal. Stern Dir. Test. at 154-55 (explaining that he could only "guess" that the Corporation for Public Broadcasting ("CPB") stations covered by NPR's rate proposal equaled 100 or 200 and would be guessing at the number of additional websites that would be covered —"15 to 50').
- Mr. Stern did not know how much streaming NPR stations are doing. Stern Dir. Test. at 163.
- Mr. Stern could not specify the costs incurred or revenues received by NPR member stations for webcasting. Stern Dir. Test. at 178-79.
- Dr. Jaffe was no better, admitting that he had not looked at any NPR financial information since the 1990s. Jaffe Reb. Test. 269-71.
- Dr. Jaffe did not know if NPR uses more or less music than Clear Channel. Jaffe Reb. Test. 271.

275. Other than generalized assertions, NPR has provided no evidence at all of the economics of its stations, including their costs, revenues, or music usage. Essentially NPR asks

the Board to take it on faith that the 800 stations that are barely discussed in their testimony — some of which are very large — all cannot or should not have to pay the same rates as the stations they are competing with. There is simply no basis in the record to support this claim.

276. Mr. Johnson, NRBNMLC's witness, admitted that he did not know the listenership or other information for other stations. Johnson Dir. Test. at 173. Nor did he review any documents or have any basis for saying that his station was "representative" of other religious broadcasters, other than that they have the same mission. Johnson Dir. Test. at 205-08. In fact, NRBNMLC admitted in its own findings that it represents "a wide variety of noncommercial radio stations, ranging from small single-station to larger multi-station companies." NRBNMLC PFF ¶ 2.

277. IBS/WHRB provided testimony about one station — WHRB — which showed that WHRB has an operating budget of $130,000 per year, in addition to subsidies from Harvard University and the ability to raise $100,000 in a capital campaign as needed. Papish Dir. Test. at 153.

278. CBI provided testimony about two college broadcasting stations, but conceded that there was a wide range of different stations in terms of both listenership and revenues and that station budgets were not necessarily reflective of the funds at their disposal due to universities picking up various costs. Robedee Dir. Test. at 196-99. Mr. Robedee testified that he did not substantiate his general testimony with any formal survey of all the educational stations, and thus lacked any basis for a claim that his station was typical. *See, e.g.* Robedee Dir. Test. at 183-84, 192-97.

279. Moreover, the evidence established that some of CBI's member stations' annual budgets are hundreds of thousands of dollars. Robedee Dir. Test. at 194-95.

280. In sum, the situation in this proceeding is similar to the situation in the Webcaster I proceeding — noncommercial stations have not established any basis in economics or otherwise for a lower rate. Webcaster I CARP Report at 89-91.

2. The Evidence in the Record (Submitted by SoundExchange) Demonstrates That Noncommercial Stations — Especially NPR Stations — Can Be Very Large and Compete Directly with Commercial Stations.

281. The sole record evidence about the economics of NPR and its member stations was introduced by SoundExchange. That evidence shows, without question, that NPR itself has enormous financial resources and a significant streaming operation.

282. What we know about NPR's streaming operations is that, taken as a group, NPR and NPR stations may well be the third (or second or first) largest streamer (including both music and non-music programming) — next to Yahoo! or AOL. In 2004, NPR conducted a survey of its stations to determine the amount of its streaming operations. That survey showed that:

- System-wide, NPR stations averaged a simultaneous listenership of 24,607. SX Trial Ex. 67 at CRB-NPR 000036. That equates to estimated monthly listening hours of 17,717,040 per month (24,607 average listeners at any one time x 24 hours per day x 30 days per month). Notably, this survey was done in 2004, and the evidence is overwhelming that streaming listenership overall has increased dramatically since then. SoundExchange PFF Section VII.G.
- While many NPR stations (35% of those surveyed) average simultaneous listenership of less than 100, there are NPR stations that, by themselves, have average simultaneous listenership of over 1000. SX Trial Ex. 67 at CRB-NPR 000036.

- Although NPR has argued that music is a small part of its overall programming offering, the evidence belies that, at least for those stations that choose to stream. Mr. Stern conceded that "most of the streaming hours are for music." Stern Dir. Test. at 210. The NPR survey showed that 61% of the NPR programming (by programming hours) is jazz, classical, popular/rock, or other music, SX Trial Ex. 67 at CRB-NPR 000038, and, for those stations that could measure aggregate tuning hours to particular programming (the response rate was low), 58% of the total listening hours was to jazz, classical, popular/rock, or other music. SX Trial Ex. 67 at CRB-NPR 000042.

- Indeed, the record reflects that some NPR stations are moving their music programming to Internet-only streams, which further confirms that listening to music and music programming is more common on the Internet than over-the-air. Stern Dir. Test. at 247-48; Brynjolfsson WRT at 40.

- The record also reflects that NPR.org has seen, in the words of NPR's Annual Report, "meteoric growth" with monthly unique visitors reaching 5 million per month in 2004, double what they had been previously. SX Trial Ex. 68 at 1 (NPR Annual Report).

283. With respect to revenues, SoundExchange's proposed findings detail some of the relevant financial numbers for NPR as well as WAMU, the local Washington D.C. NPR station. SX Ex. 201 RP (WAMU Financials); SX Ex. 202 RP (WAMU Annual Report). Noncommercial Broadcasters' complain about Dr. Brynjolfsson's use of WAMU as an example, but that complaint is unreasonable for many reasons, not the least of which is that *WAMU is the station website that NPR itself chose to present to the Court as a demonstration of a typical NPR station.* Serv. Ex. 172.

284. Not only does WAMU have very significant financial resources, but WAMU's experience demonstrates NPR's use of music on the Internet and shows how unfair the less than $100 per station fee NPR proposes is. WAMU's operates a 24-hour per day bluegrass-only side channel — which undoubtedly competes with commercial bluegrass programming. Despite Mr. Stern's claims that there is little money in streaming and that bluegrass programming was not

popular, WAMU raised $110,000 in underwriting and listener donations in one year. SX Ex. 202 RP at 18 (WAMU Annual Report).

285. There also can be little dispute that all webcasters — commercial and noncommercial — are competing for the same audience, which drives revenue whether a station is commercial or noncommercial. Griffin WRT at 12-16; SX PFF XI.D. NPR is even using webcasting to market HD Radio, just like commercial stations do. Stern Dir. Test. at 189-90 (discussing use of webcasting side channels as a "marketing device").

286. Although Mr. Stern sought to distinguish NPR from commercial stations, he conceded that the larger NPR's audience, the more money it could bring in from corporate sponsorship. Stern Dir. Test. at 229-30. He agreed that the same principle applies to webcasting. Stern Dir. Test at 230. Indeed, Mr. Stern and NPR describe themselves as "'devotees of the Google view of the world. If you fulfill a service that people need and bring people together, you'll figure out the business models in the long term.'" Stern Dir. Test. at 233-34 (confirming substance of quote from Mr. Stern in Billboard Radio Monitor). Dr. Jaffe also agreed that the more donations a stations was likely to get and the more listeners, the more underwriting a station would be likely to get. Jaffe Reb. Test. at 268-69.

287. NPR's own strategies make this clear. In its Blueprint for Growth, NPR recognizes that it is competing with commercial stations for revenues and explains that creation of a music portal is an important component for NPR's future earning potential. SX Ex. 233 RP.

288. Even the testimony of IBS/WHRB's witnesses specifically refutes the supposition that educational stations do not compete with commercial webcasters. IBS/WHRB PFF ¶ 19. The record (consisting significantly of testimony by IBS and WHRB's witnesses) clearly

demonstrates that college stations position their services to compete with commercial stations. The evidence in the record shows that many of IBS's member stations use the Live365 service to stream their simulcasts — thus, their services are in side-by-side competition with thousands of other non-collegiate stations, including numerous commercial stations, available on Live365. Kass Dir. Test. at 46-47. Furthermore, WHRB makes its competition with commercial stations explicit: it has trademarked a phrase describing its programming because "in radio, the way one markets its brand or its programming tends to be very competitive." Papish Dir. Test. at 89-90.

3. Noncommercial Stations Mischaracterize the Purpose of SoundExchange's Evidence.

289. SoundExchange has not presented evidence of large noncommercial stations to argue that all noncommercial stations should pay the same flat rate. Rather, SoundExchange has provided that evidence to demonstrate that noncommercial stations come in many different sizes and should be treated differently depending primarily on their use of music (e.g. based on performances).

290. The point of Dr. Brynjolfsson and Mr. Griffin's testimony is not that all noncommercial stations should pay a large amount in royalties. Griffin WRT at 12-16; Brynjolfsson WRT at 40-42. Rather, it is that there is a vast variation in noncommercial stations and the one-size-fits-all flat fee approach of the Noncommercial Broadcasters' rate proposals are unfair to copyright owners and performers.

291. As demonstrated in SoundExchange's proposed findings, small noncommercial stations will not pay a significant sum based on the per performance rates in SoundExchange's rate proposal. SX PFF ¶¶ 1193-95. And Noncommercial Broadcasters concede that they are unlikely to be affected by the per subscriber minimum or the percentage of revenue, which does

not include things like government subsidies in the revenue base. Joint Noncomm. PFF ¶¶ 89-93. But noncommercial stations that use significant amounts of music and compete with other types of consumption of music should pay rates commensurate with that use.

292. In criticizing SoundExchange for identifying for the Judges that there are large noncommercial stations making enormous use of music (including many NPR stations), Joint Noncomm. PFF ¶¶ 57-70, Noncommercial Broadcasters hope to paper over the fact that their rate proposals — all of which provide for an absurdly low flat fee that is unconnected to music use no matter how large a station's streaming audience — are unfair to copyright owners and performers.

293. In contrast, under SoundExchange's proposal, if a noncommercial station uses little music because it has few listeners or is mostly talk, it will pay few royalties. But if a noncommercial station uses lots of music and has many listeners, it will pay more. Given Noncommercial Broadcasters' assertion that many noncommercial stations have few listeners, those stations will pay relatively little under SoundExchange's proposed rate. SX PFF Section XI.F.2.

D. NPR's Promotional Arguments Are No Different Than Any Other Webcaster's and Provide No Basis for Providing a Reduced Rate.

294. In its Proposed Findings of Fact, SoundExchange responded in detail to the arguments made by all webcasters about the claimed "promotional" effect of webcasting. SX PFF Section IX. All of the analysis provided therein applies equally to noncommercial stations' various promotional claims, which are without merit or record evidence for the same reasons, including:

1) Noncommercial stations have not and apparently cannot quantify the supposed benefit that they provide to sound recording copyright owners and performers; there is thus no basis on which the CRJs can make any adjustment or account for this supposed promotional benefit in the royalty rate. NPR PFF Section IV.A.1.a;

2) The evidence shows that noncommercial stations do rely on matters outside of the statutory license — live performances, artist interviews, news shows or articles, and comprehensive marketing campaigns — that either include no performances subject to the statutory license or include such performances as a tiny part. *See, e.g.*, NPR PFF ¶¶ 43-50, 55, 60; Stern Dir. Test. at 267-69. To the extent that noncommercial stations engage in any of these other activities — for their own benefit to have a product that will gain and retain listeners — they cannot claim that such activities entitle them to a discount on the statutory license. Stern Dir. Test. at 172-74; SX PFF Section IX;

3) The evidence is very clear that promotion is a two-way street; noncommercial stations receive significant benefit from artists and others' live performances and participation in noncommercial programming, as well as any CDs that noncommercial stations may receive from record companies. These other activities provide no basis for a discount on the statutory license;

4) Noncommercial stations have made no effort to focus on the key question at the heart of the factor identified by Congress for consideration — the net promotional or substitutional effect of streaming. SX PFF Section IX.

295. The promotional arguments of NPR warrant a short additional response. NPR — like DiMA and the Broadcasters — makes its entire promotional case based on features of its website that are not covered by the statutory license. Indeed, all or virtually all of the features of the NPR website that Mr. Stern highlighted in his demonstration dealt with features other than webcasting under the statutory license. Stern Dir. Test. at 172-75; Services Ex. 172.

296. Similarly, Mr. Stern identified "All Songs Considered" as one of NPR's most promotional shows, but also explained that show consists mostly of concerts, live interviews, and chats and, to the extent that they use recorded music, NPR obtains voluntary licenses for such uses. Stern Dir. Test. at 267-69.

297. NPR's also demonstrates that noncommercial stations receive great benefits from record companies and artists, who provide programming for the noncommercial stations. Ms. Fink testified about a host of different NPR features, mostly not about webcasting. Fink Dir. Test. at 100 (discussing a mix of interviews, commentaries, and live musical performances). But NPR gets a large benefit because its programming is "well-founded on the music of tons of musicians who are providing them with lots of programming." Fink Dir. Test. at 103. Ms. Brooke similarly testified that she provides programming to NPR, which is of great benefit to NPR. Brooke Dir. Test. at 193.

298. Finally, IBS/WHRB improperly cites to websites that are not in the record of this proceeding to make various arguments about promotion. IBS/WHRB PFF ¶ 27. Such attempts to inject extra-record material into the record, especially material that the CRJs have already found to be irrelevant to this proceeding (Order Denying Webcasters' Motion to Compel on Payola, March 28, 2006) is inappropriate and should be stricken from the IBS/WHRB proposed findings.

E. Noncommercial Broadcasters Mischaracterize SoundExchange's Expert Testimony.

299. Noncommercial Broadcasters, lacking a rebuttal to Dr. Brynjolfsson and Dr. Pelcovits, mischaracterize their testimony, suggesting that they conceded that their willing buyer/willing seller analysis would not lead to the fair market value to be paid by Noncommercial Broadcasters. Joint Noncomm. PFF ¶¶ 51-55. That is wrong. Rather, Dr. Brynjolfsson and Dr. Pelcovits made the point that, in the free market, stations not pursuing financial goals, but rather investing in some other mission (be it educational or something else) are themselves price takers — they can choose or not choose to make an investment in student

education or spreading religious teachings, but they have to do so paying the rates that are otherwise determined in the marketplace. Brynjolfsson WDT at 40; Pelcovits WDT at 5-6. That result is compelled by the willing buyer/willing seller standard, and Noncommercial Broadcasters have provided no evidence to the contrary.

1. Noncommercial Stations' Rate Proposals Are Flawed and Their Benchmarks Cannot Serve as a Basis for a Rate in this Proceeding.

300. As discussed in SoundExchange's PFF Section V.D., noncommercial stations' primary benchmark — the fees set for musical works under 17 U.S.C. § 118, is flawed for numerous reasons. In their proposed findings, noncommercial broadcasters raise, for the first time, a number of arguments that are either improper, unsupported by the evidence, and/or simply wrong. SoundExchange discusses these in turn.

2. Noncommercial Stations Cannot Rely on SWSA.

301. IBS/WHRB refers repeatedly to the agreement between SoundExchange and noncommercial stations under the Small Webcaster Settlement Act. IBS/WHRB PFF ¶ 15 (citing Federal Register announcement of settlement); IBS/WHRB PFF ¶ 16 (arguing that SWSA created a separate class of beneficiaries entitled to a discounted rate); IBS/WHRB PFF ¶ 23 (explicitly referencing SWSA's rates); IBS/WHRB PFF ¶ 28 (same). The other noncommercial stations, through the Joint Noncomm. PFF, also reference SWSA, arguing, as IBS/WHRB does, that SWSA compels the CRJs to set a separate rate for noncommercial stations.

302. As discussed in SoundExchange's Reply Conclusions of Law, the attempt to use SWSA — a temporary measure that is now over and whose policy cannot be imputed into the willing buyer/willing seller standard — is improper. SX Rebuttal Conc. Section III.B. IBS/WHRB's attempt to inject the agreement under SWSA — which, by statute, may not be

admitted into evidence in this proceeding, 17 U.S.C. 114(f)(5)(C), and can be given no consideration in this proceeding — is egregious and should be stricken. The SWSA rates, by statute, cannot be part of the record in this case, and IBS/WHRB's Proposed Findings are improper both because they violate the terms of SWSA and because they seek to inject extra-record material into the proceedings.

3. NRBNMLC's Reliance on the 2001 NPR-SoundExchange Agreement Is Without Merit.

303. For the first time in this proceeding, NRBNMLC puts forward the 2001 NPR-SoundExchange agreement, which covered streaming from 1998 to 2004 as a basis for setting rates in this proceeding. NRBNMLC PFF ¶¶ 52-59. That agreement is of no use in this proceeding for multiple reasons.

304. As the agreement itself explains, it was entered into based on pressure from the CARP itself seeking to have the parties resolve issues related to NPR outside of the proceeding. Serv. Ex. 157 at SX0085154. It thus cannot be a reflection of the willing buyer/willing seller standard.

305. In addition, the agreement is structured as [REDACTED] Serv. Ex. 157 at SX0085159.

306. The agreement dates from 2001, has expired, and there is nothing in the record to allow one to estimate changes, for example, in the amount of streaming and the number of NPR and CPB stations actually covered by the agreement (the agreement specifies 410). Serv. Ex. 157 at SX0085154. Mr. Stern testified that there are more stations today than there were in 2001

and could provide no specific evidence on streaming levels in 2001 or 2006. Stern Dir. Test. at 163.

307. The agreement is expressly non-precedential and cannot be used by SoundExchange or NPR as a benchmark or for any purpose in this proceeding. Serv. Ex. 157 at SX0085164. It thus cannot be used as a basis to set rates for NPR stations, much less any other noncommercial station. Indeed, as discussed in SoundExchange's Conclusions of Law, the Librarian has made clear that such non-precedential agreements are "highly suspect" as a benchmark, especially given the absolute lack of evidence concerning the agreement before the CRJs. Webcaster I CARP Report at 90 (citing decisions from the Librarian).

4. Noncommercial Broadcasters Cannot Relitigate the Webcaster I CARP.

308. Noncommercial Broadcasters argue that the Webcaster I CARP and the Librarian's Decision in Webcaster I were not consistent with the willing buyer/willing seller standard. Joint Noncomm. PFF ¶¶ 71-82. As discussed in detail in SoundExchange's Conclusions of Law, Noncommercial Broadcasters cannot relitigate Webcaster I and they have provided no evidence, other than evidence that was heard and considered by the CARP and the Librarian, to provide that the Librarian's Decision was incorrect.

5. The Benchmarks Proposed by the Noncommercial Stations Are Each Flawed.

309. The Joint Noncommercial Stations' Proposed Findings make clear, perhaps for the first time, the basis for the noncommercial stations' rate proposal.

310. Witness testimony in this proceeding has been less than clear. Mr. Johnson based his rate proposal on the assumption that each person on his station's mailing list was listening at

all times. Johnson WDT at 6. He also approached the calculation in a second way by looking at what commercial broadcasters, as a whole, pay and estimating what noncommercial stations would pay, albeit without considering the size of listenership or any other factors. Johnson WDT at 15-16. Mr. Stern, the NPR witness who presented the rate proposal, could not explain how it was calculated. Stern Dir. Test. at 262-63. CBI begins with a 1998 CARP decision related to over-the-air broadcasting by noncommercial stations, which resulted in flat fees, follows some tortured calculations based on differences in educational stations and without consideration of increases in streaming audience to reach a per performance rate that is many times lower than the rate set by the Webcaster I CARP, and then transforms that rate into a flat fee. Robedee WDT at 31-33. None of these calculations — to the extent they were explained — make sense, even if they were based on valid benchmarks.

311. The Joint Noncommercial Stations' Proposed Findings now attempt to base their rate proposals all on the rates for over-the-air broadcasting of noncommercial stations set under 17 U.S.C. § 118. Joint Noncomm. PFF ¶ 36. They now argue that they should pay no more per listener for their streaming audience as they do, according to their rough calculations, for their over-the-air audience. Joint Noncomm. PFF ¶ 39.

312. This approach is full of flaws that cannot be overcome. As an initial matter, the musical works rate is not an appropriate benchmark, for all of the reasons discussed in SoundExchange's Proposed Findings and its Reply Proposed Findings. Second, there is no basis in the record to support the claim that each over-the-air listener should cost the same as each streaming listener. Indeed, the Webcaster I CARP rejected just such a string of assumptions made by Dr. Jaffe, when trying to convert over-the-air fees into streaming fees. The Webcaster I CARP found that it simply was not possible to translate fees set with different sellers, different

copyrights, different technologies (analog vs. digital), etc., into a benchmark without "serious deficiencies." Webcaster I CARP Report at 38-42. And the Webcaster I CARP rejected an almost identical approach advocated in that proceeding by NRBNMLC, which would have used the over-the-air rates as a proxy for streaming rates. Webcaster I CARP Report at 91-92. Indeed, the Webcaster I CARP found that, even in the absence of any other benchmark, the almost identical argument made by noncommercial stations was nonetheless invalid as a benchmark. Webcaster I CARP Report at 92. Noncommercial stations have grappled with none of these issues, and for the same reasons, all of their benchmarks must be rejected.

313. Third, there is no basis for the noncommercial stations' presumption that a flat fee can be translated from one context to another based on the number of listeners, without consideration of the fact that that some minimum amount is required for any license to permit administration of that license. The Webcaster I CARP set that minimum fee at $500 and the record evidence in this proceeding supports that rate or even a higher rate. SX PFF ¶¶ 1349-58. Mr. Johnson from NRBNMLC claims $500 is "exorbitant," Joint Noncomm. PFF ¶ 85, but at least one noncommercial station has offered exactly that. IBS — which appears to represent the smallest noncommercial stations — has already demonstrated that a flat fee of $500 is a rate that a willing noncommercial buyer would pay; although it has changed its rate proposal, IBS cannot run from the fact that, at the beginning of this proceeding, a rate of $500 with a cap on listenership which, if exceeded, would trigger a per performance rate, was what IBS was willing to pay. *See* IBS Rate Proposal (filed Oct. 31, 2005).

314. Fourth, as discussed above and in SoundExchange's Proposed Findings, a flat fee — for all noncommercial stations, no matter the size or amount of streaming — is dramatically unfair to copyright owners and performers. NPR's proposal, for example, would cover not only

NPR.org, a highly trafficked website, but also numerous large NPR stations and NPR's new music "supersite" — all for approximately $100 per NPR station. NPR Rate Proposal (filed Oct. 31, 2005); Stern Dir. Test. at 254.

315. The evidence demonstrates that, on a per performance basis, SoundExchange's proposed rates would not result in small noncommercial stations paying more than a few hundred dollars each year (Mr. Johnson's "calculation" suggesting that a station might pay $45,000 annually is a made-up number, based on assuming 2000 average concurrent listeners. Only 1 NPR station (likely NPR.org) has that level of listenership. Joint Noncomm. PFF ¶ 77); SX Trial Ex. 67 at CRB-NPR 000036 (NPR survey).

316. Thus, SoundExchange's proposed rates would not cause a hardship to small noncommercial stations and would ensure that large noncommercial stations pay royalties commensurate with their music use and would not cannibalize sound recording revenues from commercial station — something willing sellers would not allow to occur in the marketplace. Brynjolfsson WRT at 40.

IX. DIMA'S ARGUMENTS ABOUT WIRELESS SERVICES AND BUNDLED SERVICES FAIL TO ADDRESS THE RECORD EVIDENCE

A. The Record Supports Higher Minima for Wireless Services

317. In response to the extensive record evidence from SoundExchange about the impact of wireless services, the additional value that consumers place on them, and the concomitant higher royalties (in the form of higher minimum fees) that sound recording copyright owners receive, SX PFF Section X, DiMA spends most of its proposed findings arguing about what is not in the record, ignoring what is. Indeed, webcasters put no evidence in the record at all about wireless streaming, other than to concede that, in marketplace agreements,

record companies prohibit custom radio services from transmitting their services over cellular networks — precisely because rates applicable to fixed line services do not apply to more valuable wireless streaming. Roback Reb. Test. at 118-19.

318. The consumer value and royalties for wireless services are demonstrated by the ringtone market where consumers pay significant premiums and record companies receive higher royalties than even in the download market; in the wireless download market, where consumers pay more than double what they would pay for a download to a personal computer, even though each download is equally portable; and in the market [REDACTED] SX PFF Section 10.

319. Indeed, the premium even can be seen from what Clear Channel now charges for a wireless stream of a single radio station. Clear Channel now sells subscriptions to a single New York City station for $.99 per month — for something that users can otherwise get for free, over-the-air. Griffin WRT at 11; SX Ex. 220 RP (RAIN Newsletter, 9/7/2006).

320. Webcasters' claim that it is the "dual delivery" aspect of wireless audio download services (the user receives a copy on the personal computer and a copy on the cell phone) that fetches an increased price is belied by the testimony of record company executives, the ringtone agrements, and the host of record company agreements which prohibit digital music services from transmitting on custom radio and on-demand services over cellular networks. . Kenswil Dir. Test. at 15; Bryan WDT at 22. Indeed, any digital download is portable (i.e., can be taken off a personal computer) and most services allow users to make multiple copies — the additional value to users from wireless audio downloads is the ability to access music any time anywhere (which consumers are willing to pay more than double what they pay for a digital download to a

home computer). Bryan Dir. Test. at 84-85; Eisenberg Dir. Test. at 89. That proposition cannot significantly be in dispute.

321. DiMA's criticism that the evidence of a wireless premium applies to only "CD substitutes" is both wrong and, in any case, would nonetheless apply to wireless streaming. DiMA PFF ¶¶ 31-33. Mastertones are not CD-substitutes, but they command a premium over full-track downloads because they can be accessed anywhere on a cellular phone. SX PFF Section V(C). Morevoer, wireless streaming poses a greater threat to CD sales precisely because it is a perfect activity to substitute for listening to recorded music while on-the-go. Bryan Dir. Test. at 35. That is why sound recording copyright owners would price them at a higher rate, and willing buyers and willing sellers have manifested their agreement with this premium by limiting custom radio and on-demand agreements to non-wireless transmission. Bryan Dir. Test. at 35; SX PFF Section X.

322. DiMA argues that there is no evidence that there will be any greater substitution caused by wireless services, although that is belied by the fact that the investment communities believes that satellite services — similar to wireless streaming services — will cannibalize record sales more than other digital music services precisely because they are "mobile." SX Ex. 024 RR at 35-40 (Citigroup Report).

323. Moreover, substitution is not the only factor relevant under the willing buyer/willing seller standard. Ultimately, sound recording copyright owners receive a fair share of the consumer value from the exploitation of their sound recordings. Eisenberg Dir. Test. at 41. Where, as here, consumer value is greater, sound recording copyright owners receive higher royalties. SoundExchange's Revised Rate Proposal does not seek a higher percentage of

revenue, but rather only seeks higher per performance and per subscriber minima (25% higher) to reflect the greater consumer value. As Dr. Pelcovits found, such an enhanced fee is consistent with evidence in the marketplace. Pelcovits WDT at 59-61.

324. DiMA also complains that SoundExchange has not provided evidence of the total amount of use of wireless streaming services, but SoundExchange has amply demonstrated that these services are 1) in the market today; 2) are being offered by major companies, including Sprint, Alltel, Real Networks, XM, and Sirius; 3) are viewed by industry analysts as likely to be "more popular" than wireless audio downloads; and 4) consumers are willing to pay more for fewer channels because of the ability to access them anytime, anywhere. Griffin WRT at 24-26.

B. The Record Supports a Higher Rate for Bundled Services

325. DiMA also disputes the record evidence concerning treatment of bundled services. DiMA PFF ¶¶ 52-58. Both Mr. Fancher and Dr. Pelcovits agree that the Court should address bundled services; the only question is how.

326. As Dr. Pelcovits explains, Mr. Fancher's proposal seriously undervalues sound recordings offered in a bundled services. Pelcovits WRT at 33-34. Such services generally involve commercial-free subscriptions that are included with a group of other services for a single price. Mr. Fancher would value the royalties based on attributing hypothetical advertising revenues to the service, as if it were not commercial-free and were some other service in the market, even if it had a lower bit rate, fewer channels, or was otherwise quite different. Fancher Test. at 298-99.

327. As Dr. Pelcovits explains, the primary issue with respect to bundled services is that, where a revenue share is not possible, how to compensate the willing seller who will not

receive a piece of the revenue earned simply because the accounting will be difficult. The solution — based on the sole marketplace agreement in the record that addresses this issue ([REDACTED]) between a large webcaster and a large record company ([REDACTED] is an uplifted per performance rate which compensates for the loss of the revenue share. Pelcovits WRT at 33-35; Services Ex. 46 (custom radio agreement addressing bundled services). In contrast to Dr. Pelcovits' focus on real agreements, Mr. Fancher's approach has no marketplace precedent or logic behind it.

X. THERE IS NO BASIS FOR A LOWER RATE FOR SMALL COMMERCIAL WEBCASTERS

328. Both Small Webcasters and SBR Creative, each purporting to represent smaller webcasters use essentially the same methodology as large commercial webcasters — based on musical works rate — as a benchmark for setting rates and terms. As discussed elsewhere in SoundExchange's proposed findings and conclusions, the musical works rate is not a legitimate benchmark for any webcasters.

329. Moreover, neither Small Webcasters nor SBR Creative make explicit requests for a discounted rate for small webcasters, although Small Webcasters do ask the Board to create them as a separate class of services. SCW PFF p. 22. There is, however, no basis in the record for doing so.

330. For many of the same reasons as are discussed with respect to the noncommercial webcasters, Small Webcasters' arguments are essentially a plea that they should be treated differently than the market would otherwise. But, as discussed in SoundExchange's Conclusions of Law, the Small Webcaster Settlement Act provides no basis on which to do so. The plea to

"preserve the SCW [Small Commercial Webcaster]" industry is a policy decision, not an application of the willing buyer/willing seller standard. SCW PFF ¶ 20.

331. As Dr. Brynjolfsson testified, the fair market value would likely be set by larger entities negotiating over the rights; indeed, small commercial webcasters would have less — not more — bargaining power in reaching rates and terms with the copyright owners that own the majority of the sound recordings in the market. Brynjolfsson WDT at 6.

332. Based on music usage and revenues, there also appears to be no basis in the record for drawing distinctions that Small Webcasters would have. SBR Creative, which operates twelve to fifteen streaming stations, as well as approximately 70 to 100 holiday channels, has generated webcasting revenues that exceed its webcasting costs in each of the past three years. SX Trial Ex. 117; Rahn Dir. Test. at 66-70. SBR's revenues have grown steadily during that period. In 2005, its webcasting revenues exceed its costs by [REDACTED]. SX Trial Ex. 117.

333. AccuRadio operates a very significant streaming operation, reaching 900,000 listeners per month. It has [REDACTED] in value in recent years as well. Brynjolfsson AWDT at 12; SX 40 DR. Mr. Hanson started AccuRadio with about $50,000 of his own money—no bank loans, no venture capital. Hanson Dir. Test. at 71-72. In late 2003, Kurt Hanson [REDACTED]. SX 40 DR. Dr. Brynjolfsson noted that [REDACTED]. Brynjolfsson AWDT at 12.

334. Mr. Hanson concedes that he projects very significant growth and increases in growth into the future. SX. Tr. Ex. 128. And even though AccuRadio did not meet its 2005

target revenue until 2006, its revenues continue to climb dramatically — from [REDACTED] in 2005 to an estimated [REDACTED] in 2006.

335. And, AccuRadio has nothing more than "de minimis" capital expenditures. Hanson Dir. Test. at 73. Indeed, Mr. Hanson's operation is a testament to the minimal expenditures needed to operate a large webcasting operation.

336. With respect to the remaining issues — promotion/substitution and relative contribution — SBR Creative and Small Webcasters make the same arguments as the other webcasters — all without quantification. Indeed, consideration of the buy button data submitted by AccuRadio demonstrated that very few people — in comparison to its listenership — actually purchase CDs through AccuRadio's buy buttons. Pelcovits WRT at 19. SoundExchange's response on all of these issues is provided at SX PFF Section VIII.

337. Mr. Hanson points to a "study" that he claims to have done showing that his listeners buy 2 additional CDs based on influence from listening to AccuRadio. SCW PFF ¶ 11. But nothing from that "study" was produced in discovery, nothing other than Mr. Hanson's assertion was put into evidence, he admitted it was ongoing and not completed at the time he testified Mr. Hanson's testimony, and he admitted that it was not a random sample or validated in any way. Hanson Dir. Test. at 61-64. And there appears to have been no corresponding analysis of possible substitution. That "study" is entitled to no weight concerning promotion.

338. Finally, there is no evidence in the record upon which the Court could determine where to draw the line between "small" webcasters and large ones. For the first time, Small Webcasters argue in their proposed findings that the Court should look to definitions that other governmental agencies use for defining small businesses. SCW PFF ¶12. But there is no record

evidence to support use of such criteria here, no evidence about the impact of drawing such a line here, and no evidence about how such criteria would fit with this marketplace or under the willing buyer/willing seller standard.

339. Even if there was record evidence about what is a "small webcaster," there is no basis in the market for drawing a distinction, especially for AccuRadio and SBR Creative, the two companies discussed in the record. AccuRadio sells the same sort of advertising and competes for the same listeners as Yahoo! and AOL do. Indeed, it sells advertising jointly, through Net Radio Sales, with large simulcasters such as CBS Radio, Bonneville, and Susquehanna. SX Ex. 211 RP . AccuRadio has a monthly listenership that is very large, reaching approximately 5,000,000 aggregate tuning hours per month. Hanson Dir. Test. at 40. There is no credible reason to believe that a willing seller would given AccuRadio a reduced rate in the free market given the size of its streaming audience (which is approximately 1/3 of [REDACTED)].

340. SBR Creative provide the back-office for major simulcasters, programming channels for Clear Channel and the like. Rahn Dir. Test. at 64-65. There is no credible reason for the Court to establish a separate rate that would allow Clear Channel and others to outsource streaming to "small" companies.

341. For all of these reasons, there is no record basis on which to set a separate "small" webcaster rate, and no basis on which to differentiate between "small" and "large" webcasters. All are competing for the same audience and advertisers, using the same tools, in the same way.

XI. RLI HAS FAILED TO ESTABLISH THAT IT SHOULD BE A DESIGNATED AGENT.

A. Overview

342. RLI's Proposed Findings of Fact and Conclusions of Law fail to establish with credible record evidence that RLI is a suitable Designated Agent.

B. RLI Lacks the "Bona Fides" to Serve as a Designated Agent.

343. RLI's claim that it has the "bona fides" to serve as a Designated Agent, *see* RLI PFF Section IX, is inconsistent with the facts in the record.

1. RLI Represents the Interests of Music Licensees, Not Copyright Owners and Performers.

344. The undisputed record establishes that RLI has not represented the interests of artists or copyright owners in negotiating royalty rates: RLI freely admits that "RLI has not taken an active role in negotiating rates." RLI PFF ¶ 96. RLI tries to place the blame for this failure on SoundExchange's shoulders. RLI PFF ¶ 96. The evidence makes clear, however, that RLI has not negotiated rates on behalf of copyright owners and artists because it has chosen to align itself in rate-setting proceedings with copyright users and to advance its own profits:

- In a prior proceeding, Mr. Gertz testified as a witness for the *webcasters*, for a low rate to be paid to all copyright owners and artists. Gertz Dir. Test. at 234.
- In this proceeding, Mr. Gertz provided an employee (Karyn Ulman) to testify as a witness for DiMA. Gertz Dir. Test. at 242.
- Furthermore, on the eve of this proceeding, RLI, entered into a sham agreement with DiMA, apparently in an attempt to assist DiMA in creating a low benchmark. RLI PFF ¶ 33; SX PFF at ¶¶ 1639-42, 1579. The agreement contained an artificially low rate, and no member of DiMA has signed it. SX PFF Section XVI.F.2.b. Indeed, even DiMA itself appears not to have cited the agreement in its proposed findings.
- RLI is a for-profit business more interested in its bottom line than in the interests of artists. SX PFF Section XVI.F.1.

- RLI is the subsidiary of MRI, which is dedicated to the interests of copyright users, such as webcasters, and which is owned, in part, by an investment firm that also owns webcasters. SX PFF ¶ 1626; Gertz Dir. Test. at 45. RLI and MRI share employees and systems. As Mr. Potter from DiMA explained it, the people who DiMA deals with from the two organizations "all are from both organizations." Potter Dir Test. at 182. That conflict of interest is fundamental and, without more, is dispositive as a basis for denying RLI Designated Agent status.

345. To the extent that RLI is concerned with the interests of artists at all, the record shows that RLI cares only about a select few artists who can serve RLI's profit motives. Despite its purported concern for the interests of "all" copyright owners and performers, *see* RLI PFF ¶ 2, RLI concedes that it would like to pay advances not to all performers, but only to the most lucrative clients on a case-by-case basis, and only to the extent that the advances could be recouped by non-statutory separate deals. Gertz Reb. Test. at 80-88. The advances RLI proposes are merely a method for RLI to take advantage of its proposed status as a Designated Agent to lure more lucrative copyright owners and performers into business deals that have nothing to do with the statutory license, thus enriching RLI and its shareholders at the expense of all the other copyright owners and performers. Gertz Reb. Test. at 80-88; Kessler WRT at 6.

346. Indeed, RLI is so focused on its own profits that it argues that the Judges should amend the reporting procedures, despite the resulting inefficiencies, because otherwise "RLI will be unable to attract and maintain affiliates." RLI PFF ¶ 110. In other words, RLI seeks changes in the regulations to advance its for-profit business opportunities, not to benefit royalty recipients.

2. RLI Has Failed to Show That It Is Capable of Collecting and Distributing Statutory Royalties Promptly and Efficiently.

347. Notwithstanding its unsupported assertion that it is capable of administering the license, *see* RLI PFF Section IX.A, RLI has failed to show that it has the administrative and

infrastructure systems in place to administer the statutory license. Nothing in the record establishes that RLI currently has the systems and databases in place to run collection and distribution operations. Notably, RLI uses the future tense in stating that its systems "will be" based on technology developed by its parent company, MRI. RLI PFF ¶ 92. This phrasing strongly suggests that RLI currently lacks the necessary infrastructure.

348. Indeed, all of RLI's discussion of its "bona fides" are in the future tense, and have not been substantiated by any exhibits or evidence beyond Mr. Gertz's conclusory assertions. *See, e.g.* RLI PFF ¶¶ 57, 92-94. Absent evidence that RLI is *currently* in a position to collect and distribute royalties, there is no basis on the record to grant RLI the status of a Designated Agent.

349. Nor has RLI established that it would be capable of working with SoundExchange if granted Designated Agent status. RLI's own findings demonstrate that RLI has not been able to cooperate with SoundExchange to resolve the disputes that would arise should multiple agents be designated. RLI PFF ¶¶ 47-51; *see also* Kessler Dir. Test. I at 212-13 (describing the significant difficulties in working with RLI on Designated Agent matters when RLI was briefly given that status).

350. By contrast, SoundExchange has a proven track record that shows that it can serve capably and efficiently as the Designated Agent. *See, e.g.*, SX PFF ¶¶ 1558-567.

3. RLI Ignores the Record Evidence Regarding the Inefficiencies, Costs and Confusion That Would Arise from a Multiple Agent System.

351. As set forth in SoundExchange's proposed findings, there are any number of inefficiencies and conflicts that would arise in a multiple agent system. SX PFF Section XVI.B.

RLI essentially ignores this evidence and simply asserts in two sentences, with virtually no explanation, that its DARPA proposal would make these problems disappear. RLI PFF ¶ 90. There can be no dispute that a multiple agent system will result in duplicative costs in personnel and systems — an inefficiency that RLI nowhere addresses. In the absence of any explanation or record evidence, RLI's testimony on this point simply is not credible.

352. In addition, RLI proposes that the Judges should resolve the potentially numerous disputes that would arise from a multiple agent system. RLI PFF ¶ 91. Putting aside the question of whether the Judges would properly have jurisdiction, this proposal would be extremely inefficient and could potentially require the Judges to devote an inordinate amount of their time to resolving such disputes. The Judges should reject RLI's proposal. SX PFF Section XVI.B.1.

4. There Is Virtually No Evidence in the Record That RLI Is Anything Other Than the Idiosyncratic Choice of a Handful of Artists.

353. RLI contends that it has artist support. RLI PFF ¶ 92. But RLI cannot escape the fact that only four artists have selected RLI as their agent, *see* Gertz Dir. Test. I at 277, and that not a single artist testified for RLI in this proceeding.

354. In fact, the undisputed evidence is that all of the major organizations that collectively represent tens of thousands of recording artists and performers uniformly support the designation of SoundExchange as the sole Designated Agent. SX PFF Section XVI.D; Lee Reb. Test. at 240, 243-44; Lee WRT at 4.

355. Thus, RLI's arguments about what artists want, *see* RLI PFF ¶¶ 58, 71, should be given little or no weight. They are not based on the record in this case.

356. As the Webcaster I CARP noted, webcasters, such as Yahoo!, have little interest in who is designated as an agent, Webcaster I CARP Report at 133. DiMA indeed has testified to that effect in this proceeding. Potter Dir. Test. at 172-73 (noting that the number of Designated Agents is "not a drop-dead issue for [DiMA] in any respect"). The question under the willing buyer/willing seller standard focuses more on the interests in copyright owners and performers, who have "a direct and vital interest in who distributes royalties to them and how that entity operates." Webcaster I CARP Report at 133. The evidence, on this record, is overwhelming that copyright owners and performers want SoundExchange to be the one and only Designated Agent.

C. RLI's Competition Arguments Are Meritless.

357. In its findings, RLI continues to insist that "competition" between SoundExchange and RLI would be beneficial. RLI PFF Sections VII and VIII. But the record reveals that RLI's argument about cost competition merely describes how RLI would shift costs to SoundExchange, try to gain profits by enticing high-earning copyright owners and artists to elect RLI, and leave SoundExchange with the lion's share of the costs necessary for all designated agents to administer the statutory license. *See, e.g.*, Gertz Dir. Test. at 48, 101, 151, 315; Gertz WRT at 2; Kessler WRT at 3-5; Kessler Dir. Test. I at 196-97; Lee WRT at 12; Paterno Reb. Test. at 188; *see also* SX PFF at 1585-95.

358. RLI claims that the existence of multiple Designated Agents would "create incentives for each Designated Agent to reduce its costs and be more efficient." RLI PFF at ¶ 84. But RLI presented no evidence in the record to substantiate its claims other than the unfounded assertions of Mr. Gertz. Nor did RLI present any credible evidence that SoundExchange is

inefficient. The Judges should reject RLI's self-serving and unsubstantiated arguments about competition.

359. In its Proposed Findings, RLI alleges that "competition will make the agents honest by providing marketplace checks and balances, [and] serve as a natural constraint on administrative fees and costs." RLI PFF at ¶ 66. The evidence in the record plainly shows, however, that the structure of SoundExchange provides a built-in constraint on fees and costs — namely its accountability to copyright owners and performers on its Board of Directors, a feature entirely lacking from RLI.

360. In its findings, RLI abandons its prior arguments that multiple collectives could compete on the basis of statutory interpretation and royalty rates. *Compare* RLI PFF ¶¶ 53, 66, 69 *with* Gertz Dir. Test. at 48, 101, 151, 315; Gertz WRT at 2. Now, RLI simply alleges that multiple designated agents will result in competition in the areas of cost, "service," and distribution policies. RLI PFF ¶¶ 53, 66, 69, 84-89. RLI cannot overcome the fact that "competition" concerning administrative costs and distribution policies will not advance the policies behind the statutory license that RLI seeks to administrate. *See, e.g.* Kessler WRT at 3; Lee WRT at 10-12; Kessler Reb. Test. at 15-25.

361. Competition with regard to administrative costs will amount to free-riding by RLI on SoundExchange's litigation, enforcement, and outreach efforts. SX PFF ¶¶ 1585-92. The record of RLI's conduct of the last several years amply demonstrates this.

362. Competition on distribution policies would only lead to mass confusion, as different Designated Agents would pay for the same performances in different ways, leading to

disputes and ultimately a shortfall of revenue to pay copyright owners and performers. SX PFF ¶¶ 1582-83.

D. RLI Misrepresents the Record.

1. RLI Misrepresents Itself.

363. RLI repeatedly misrepresents its size and its number of affiliates. RLI claims that "the current market has coalesced around two collectives representing willing sellers," referring to itself and SoundExchange, and that its affiliates represent a "substantial market." RLI PFF ¶¶ 57, 59. These assertions cannot be squared with the record, which shows that RLI represents only four artists and a handful of copyright owners. Gertz Dir. Test. at 277; Gertz Reb. Test. at 78.

364. Similarly, RLI repeatedly claims that Dr. Dre is an artist affiliated with RLI. RLI PFF ¶¶ 6, 72. But the record evidence from RLI's own witness, Peter Paterno (who represents Dr. Dre) shows that Dr. Dre *has not* affiliated with RLI. Paterno Reb. Test. at 182. Indeed, whereas RLI asserts that Dr. Dre does "not want to affiliate with SoundExchange," RLI PFF ¶ 6, Mr. Paterno testified that Dr. Dre *is affiliated* with SoundExchange. Paterno Reb. Test. at 158.

2. RLI Misrepresents SoundExchange.

365. RLI claims that both RLI and SoundExchange "represent[] the interests of two separate groups of copyright owners and performers." RLI PFF ¶ 9. While technically true, this is a grossly misleading statement — as noted above, RLI represents four artists and SoundExchange represents literally thousands of copyright owners and artists. SX PFF Section XVI.D; Gertz Dir. Test. I at 277; Lee Reb. Test. at 240, 243-44; Lee WRT at 4.

366. RLI argues that without another designated agent, SoundExchange will have no "incentive" to account equitably or properly to its members. RLI PFF at ¶ 70. That unsupported claim ignores the evidence in the record. SoundExchange's 18-member Board of Directors is made up entirely of representatives of copyright owners and recording artists — the two groups to whom the sound recording performance royalties are distributed. Those Board members, and the organizations they represent, have a very real "incentive" to ensure that royalties are handled equitably because they are themselves the representatives of the royalty recipients. Lee Reb. Test. at 288.

367. RLI also repeats in its findings claims that it previously acknowledged are false. RLI states in its findings that SoundExchange "would never have been able to get away with holding [the undistributed list] in secret for over ten years." RLI PFF at ¶ 87. In fact, the record reflects that Mr. Gertz *admitted that this statement is untrue.* He acknowledged during his oral testimony that he actually had "no idea" if SoundExchange actually kept the list secret, *see* Gertz Reb. Test. at 120, and conceded that he had not fairly characterized SoundExchange's actions. Gertz Reb. Test. at 116. Nonetheless, RLI reiterates this untrue statement in its findings of fact.

3. RLI Mischaracterizes the Facts Surrounding the SoundExchange-SDARS Agreement

368. RLI makes accusations about SoundExchange's voluntary license agreement with the SDARS, suggesting that SoundExchange did something improper by entering into such agreement. RLI PFF ¶ 81-82. The record tells a completely different story. The agreement between SoundExchange and the SDARS binds only SoundExchange members, but SoundExchange agreed nonetheless to facilitate payment to all copyright owners and performers regardless of membership. Contrary to RLI's misrepresentations, SoundExchange did not enter

into the agreement on non-members' behalf. Moreover, all aspects of this feature of the agreement, including SoundExchange's offer to facilitate payment to non-members, were completely disclosed in a public motion to the Copyright Office. SX Ex. 238 RP at 4 (Notification of Settlement and Motion to Suspend CARP Proceeding and Notice and Recordkeeping Rulemaking Applicable to Preexisting Services, filed March 19, 2003) (discussing treatment of non-members who are not bound by the agreement).

369. In reality, the 2003 SoundExchange-SDARS agreement reveals a great deal about SoundExchange and RLI. With respect to SoundExchange, it demonstrates its commitment to the artist and copyright owner community, even if those who are not "members" of SoundExchange. Because no other copyright owners or performers had filed to participate in the CARP proceeding, they would have effectively been foreclosed from seeking rates and terms from the SDARS under the applicable standard. SX Ex. 238 RP at 4. Thus, SoundExchange's agreement to distribute funds to members and non-members alike — on a non-discriminatory basis — protected non-participating copyright owners and performers from the outcome of a CARP that could have gone on without them (or any other copyright owners and performers participating).

370. With respect to RLI, it demonstrates once again how little RLI actually cares about copyright owners and performers. RLI did not bother to file to participate in that proceeding and thus to the extent that it has any members or affiliates, it failed utterly to represent them in that proceeding. RLI has apparently has never sought to do anything for its affilates with respect to the SDARS. RLI cannot blame SoundExchange for that.

371. Finally, RLI's attribution of sinister motives to SoundExchange and suggestion that SoundExchange is seeking to negotiate many voluntary licenses for non-statutory services in the future is simply a reflection of RLI's own business model, not SoundExchange's. RLI wants to exploit Designated Agent status to make money from non-statutory services, essentially by advancing statutory monies to entice copyright owners and performers to authorize RLI to negotiate non-statutory agreements. That is not SoundExchange's business model, nor is it an appropriate use of the trust that comes with being a Designated Agent. Thus, the SDARS agreement once again proves SoundExchange's bona fides, and reveals the true nature of RLI.

E. The PRO System Is Not an Appropriate Benchmark.

372. Furthermore, RLI's arguments that the Judges should model the current system after the PRO system on the basis of efficiency derived from competition, *see* RLI PFF ¶ 66, is irrelevant as well as unsupported. RLI's argument that multiple collectives will compete and provide "better service," "more frequent and timely royalty payments to royalty recipients," "greater transparency in royalty reporting," and "more efficient administration of licenses" rests solely on unsubstantiated theorizing by Mr. Gertz and Mr. Paterno. RLI PFF ¶66.

373. Mr. Paterno testified that when he was a "young lawyer" he tried to "figure out how the rules worked for ASCAP and BMI. Because they're very complicated," and though he had a "decent grasp at the time, not so much anymore." Paterno Reb. Test. at 163. Given this testimony, Mr. Paterno's testimony on any PRO (*see, e.g.*, Paterno WRT ¶¶ 4-6, repeatedly emphasizing his experience with PROs) should be discredited, and he is certainly not in a position to testify about the intricacies of any PRO, let alone SoundExchange.

374. RLI repeatedly cites ASCAP and BMI as reasons the Judges should bestow Designated Agent status on RLI. RLI PFF ¶¶ 63-65. Nowhere, however, does RLI address the most significant differences between SoundExchange and those PROs. Unlike SoundExchange, the PROs do not operate under a statutory license and they administer an entirely different right. Kessler Dir. Test. II at 182-83. Instead, ASCAP, BMI and SESAC each represent a designated set of voluntarily affiliated rights holders and seek to negotiate the best possible deal with those who want to perform their musical works. Kessler WRT at 4. The PROs compete with one another other to the extent they are able to obtain different rates for their members. To they extent that they offer different distribution policies, such decisions have *no* impact on the members of one of the other PROs, as each separately administers their licenses. Here, by contrast, the rate is set by the Copyright Royalty Judges. There is no competition on rate. Any competition on distribution policy will lead to disputes. Thus, a single non-profit collective, which collects royalties at the rate set by the CRJs, makes perfect sense. Kessler WRT at 3-7; Kessler Dir. Test. II at 182-83; SX PFF Section XVI.B.4.

375. The record evidence disproves Gertz and Paterno's unsubstantiated claims concerning the advantages of "competition" as demonstrated by the ASCAP/BMI/SESAC model. RLI has not established that the PROs are more efficient than SoundExchange in any way, and the record evidence that does exist on this point actually demonstrates that SoundExchange functions more efficiently than ASCAP and BMI. *See, e.g.*, SX PFF at ¶¶ 1568-74. The PROs spend more money on marketing and the duplicating of systems than is efficient. Kessler Dir. Test. II at 182-83; Gertz Reb. Test. at 128. Even Mr. Gertz conceded that RLI has not actually produced any evidence that the administrative costs are lower in the performing rights organization (ASCAP and BMI) market than they are with SoundExchange. Gertz Reb.

Test. at 102. Ms. Kessler, COO of SoundExchange, testified that SoundExchange's administrative costs are significantly lower than those of the PROs. Kessler WDT at 16; Kessler Dir. Test. I at 190.

376. Indeed, RLI's own witness testified that ASCAP and BMI do not offer competition on administrative costs. Paterno Reb. Test. at 192

XII. THE SERVICES MISREPRESENT THE RECORD.

377. SoundExchange has received eleven sets of findings and conclusions that total more than 670 pages. Given that the parties have only three days to prepare replies, SoundExchange cannot possibly document all of the misrepresentations, mischaracterizations, distortions, and errors in the Services' findings and conclusions. Even in this short amount of time, however, it has become abundantly clear that such problems are pervasive.

378. Although SoundExchange cannot realistically catalog all of the Services' misrepresentations, it offers the following examples to caution the Judges to scrutinize the Services' findings carefully.

A. Examples of Misleading Findings

379. The Services' findings contain multiple misrepresentations of evidence related to critical points in this proceeding. For example:

380. The essential factual predicate of the Services' argument that the record companies have "monopoly power" in the marketplace is that webcasters must have blanket licenses from all four of the major record labels to operate. They reject reliance on evidence derived from the digital download market because they claim that "[d]igital download services

need the catalogs of all four major labels to compete in the marketplace, heightening their competitive leverage." Joint DiMA/Br. PFF ¶ 57. The only record evidence that the Services cite in support of this assertion is the oral rebuttal testimony of SoundExchange's witness Mark Eisenberg. But the Services misrepresent Mr. Eisenberg's testimony — he said no such thing. Rather, Mr. Eisenberg testified that "[m]ajor" download services "would be at a disadvantage" without licenses from all four major record companies. Eisenberg Reb. Test at 90-92.

381. This misrepresentation reflects a pattern. The Services twist Dr. Pelcovits's testimony in a very similar fashion. They purport to quote Dr. Pelcovits as having testified that it "'Effectively turns out' that the interactive digital music services 'must have a license from each of the big four major record labels.'" Joint DiMA/Br. PFF ¶ 94. But the words attributed to Dr. Pelcovits as a quote were not spoken by him (except for the first three words). Rather, they were uttered by opposing counsel. Pelcovits Dir. Test. I at 118-19. Furthermore, Dr. Pelcovits expressed uncertainty about the very premise of the question posed by opposing counsel. Pelcovits Dir. Test. I at 119 ("I don't know whether it would be possible to have a more limited tailored service."). When opposing counsel then asked Dr. Pelcovits the same question again, but phrased in a different way, Dr. Pelcovits once again refused to agree with the question's premise. Pelcovits Dir. Test. I at 119 ("I don't know if I'd put it that way. As I said, some of the particularly larger ones are advertising that they are offering a wide range of music. They mostly make that point by genre. They say, we have a variety of different types of music that we're offering. They obviously can't represent they have everything, because they don't have everything.").

382. In another instance of grossly mischaracterizing the record, DiMA cites the oral testimony of Microsoft's Mr. Silber during the direct phase of the proceeding for the proposition

that "Given the costs associated with this proceeding vis-à-vis budgetary constraints, Microsoft declined to provide witness testimony in the rebuttal phase of this proceeding." DiMA PFF ¶ 14. Putting aside the fact that the record firmly establishes that Mr. Silber lacked all credibility regarding Microsoft's costs, DiMA's claim here is demonstrably false — Mr. Silber did not testify to these facts. To the contrary, Microsoft tried to submit rebuttal testimony from Mr. Silber that purported to make this claim about the costs of this proceeding, but it failed to present Mr. Silber, and his testimony is not in the record. Such "facts" should be stricken from the record.

383. These, of course, are just a handful of examples. In addition, SoundExchange has elsewhere in these Reply Findings highlighted for the Judges several other instances where the Services have misrepresented the evidence in material ways. *See supra* Sections IV.B.3, IV.C.1, V., XI.D. SoundExchange offers these examples not in an attempt to exhaustively list every misrepresentation, but rather to provide the Judges with a sense of the kinds of mischaracterizations and misrepresentations of the evidence that are littered throughout the Services' findings.

B. Improperly Attributed Quotations

384. Throughout their findings of fact, the various Services attribute statements in quotation marks to witnesses, when in fact it was opposing counsel, not the witnesses, who actually uttered the words being quoted. *See, e.g.*, Joint DiMA/Br. PFF ¶¶ 58, 93, 94, 125, 158, 170, 194, 195, 196, 197, 199, 235, 237; Joint DiMA/Br. Conc. ¶ 49; Broadcaster PFF ¶¶ 48, 210(a), 210(c), 211; DiMA PFF ¶ 56. The Judges should not credit this "quoted" testimony as having actually been spoken by the witnesses.

C. Unsupported Assertions

385. The Services findings are also riddled with argumentative paragraphs that find no support in the record. While parties certainly are entitled to introduce and summarize sections of their findings without providing a record citation, the Services do far more. They repeatedly make assertions or arguments well beyond introductions or summaries without supplying any citation to the record evidence. *See, e.g.*, Joint DiMA/Br. PFF ¶¶ 6, 130, 146, 147, 157, 214, 220, 253, 256, 258 (sub-¶s 1, 2), 299, 301, 308, 311, n.25, n.35; Broadcaster PFF ¶¶ 25, 59, 60, 61, 65, 68, 105, 122, 146, 172, 224, 253, 254, 255, 257, 264, 266, 267, 269, 270, 272, 287, 311, 315; Joint Noncomm. PFF ¶¶ 5, 54, 57, 62, 65, 86; CBI PFF ¶¶ 3, 10, 24, 28; RLI PFF ¶¶ 3, 6, 7, 8, 40, 51, 80, 108.

D. Documents Not in the Record

386. Finally, the Broadcasters have improperly attached two non-record documents to their findings as Appendix A and Appendix B. Appendix A is a document that simply was not offered or admitted into evidence. Appendix B includes portions of a document that was admitted into evidence as Services' Rebuttal Exhibit 5 — but the version now attached as Appendix B has new factual information typed onto several of the pages that does not appear on the version admitted into evidence.

387. In addition, IBS and WHRB cite a press release and other materials, none of which are part of the record in this proceeding. Joint IBS/WHRB PFF ¶ 27.

388. The Judges should disregard these improper extra-record materials.

XIII. TERMS

389. SoundExchange's Proposed Findings of Fact with respect to terms issues adequately address virtually all of the issues discussed in the proposed findings of the various services. SoundExchange will focus only on the issue of late fees.

390. As detailed in SoundExchange's Proposed Findings of Fact, marketplace evidence demonstrates that an increase in the late fee under the statutory license is fully supported by the willing buyer/willing seller standard and is necessary in the context of a statutory license. SoundExchange PFF ¶¶ 1254-77.

391. DiMA and the Broadcasters, ignoring marketplace agreements, including those signed by the Broadcasters' own witness, Mr. Levin, argue that there is no problem that needs to be solved. Joint DiMA/Br. PFF ¶ 292. But the record evidence demonstrates that, up until SoundExchange presented evidence in this proceeding in October of 2005, the largest webcasters were routinely and habitually late in making payments to SoundExchange, demonstrating that the current .75% per month late fees were insufficient. *See* Serv. Ex. R-37 (showing consistent late payment until the last quarter of 2005). Only after SoundExchange sought additional late fees from the Judges did webcasters in this proceeding begin to behave. With this proceeding and the threat of more strict terms behind them, one can only assume that they will return to their old ways.

392. The evidence in the record is undisputed from Ms. Kessler that, regardless of the conduct of the largest webcasters, webcasters as a whole are routinely late in making payments. Kessler WDT at 25-27. That evidence, in addition to the marketplace agreements showing much higher late fees, compels an increase in the late fee amounts.

393. Finally, the proposal made by Broadcasters that SoundExchange should have to notify licensees who are late in payments makes no sense given that all information is in the hands of licensees, including whether they are streaming or not. Joint DiMA/Br. PFF ¶ 295. For SoundExchange to have to track down all of the companies who may or may not be streaming each month because the licensees cannot comply with a straightforward regulatory requirement is unreasonable.

Respectfully submitted,

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Dated: December 15, 2006

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Before the
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LIBRARY OF CONGRESS
Washington, DC

In the Matter of	)	
DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS	)	**Docket No. 2005-1 CRB DTRA**

REPLY CONCLUSIONS OF LAW OF SOUNDEXCHANGE, INC.

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December 15, 2006

TABLE OF CONTENTS

I. PROPOSED CONCLUSIONS OF LAW RESPONSIVE TO THE JOINT PROPOSED CONCLUSIONS OF LAW OF DIMA AND THE BROADCASTERS

A. Irrelevant Preliminaries

1. Although DiMA and the Broadcasters devote considerable space to discussing the balance of policies reflected in the copyright laws, Joint Proposed Conclusions of Law of DiMA and the Broadcasters ("Joint DiMA/Br. Conc.") ¶¶ 4-9, *Congress* has already drawn the balance in the area of copyright protection for performances of sound recordings over noninteractive webcasting services. It has decided that there should be copyright protection with a compulsory license and compensation at the market rate that a willing buyer and willing seller would negotiate. 17 U.S.C. § 114 (f)(2)(B). Nothing in the Copyright Act calls for the Judges to draw some further policy balance. Rather, the CRJs' role is to apply the standards mandated by Congress.

2. Although DiMA and the Broadcasters devote considerable space to a history of the evolution of copyright protections for performances of sound recordings, Joint DiMA/Br. Conc. ¶¶ 10-27, now that Congress has determined which such performances are subject to copyright protection, that evolution is not particularly instructive about the proper application of the standards for compensation of copyright owners and artists set forth in the Act.

B. The Webcasters' Analysis of the Hypothetical Marketplace Is Legally Indefensible.

3. SoundExchange agrees with DiMA and the Broadcasters that the meaning of the willing buyer/willing seller standard is a central issue, if not the central issue, in this proceeding. *See* Joint DiMA/Br. Conc. ¶ 29. Indeed, the webcasters have predicated all of their arguments on the notion that Congress intended the Judges to hypothesize a market rate set in what they call a "competitive" market — by which they mean a market other than one inhabited by the record

companies in the real market, selling a product other than what is actually sold. *See* Joint DiMA/Br. Conc. ¶ 29.

4. Because that argument is an incorrect interpretation of the statute and is barred by binding precedent, the benchmark offered by DiMA, the Broadcasters, and indeed every one of the webcasters in this proceeding — the rates paid for performance of musical works by webcasters — is worthless and unsupported.

1. DiMA and the Broadcasters Misread the Librarian's Decision.

5. Given how essential it is to the webcasters' case that the hypothetical marketplace have sellers that do not resemble the existing record companies, it is remarkable how little legal support they have for that approach. First, they claim that the Librarian in reviewing the Webcaster I CARP decision mandated that the rates set here be those that would prevail in a "competitive" marketplace. Then they expand on that single word to effectively eliminate the willing buyer/willing seller standard and replace it with the very standard that the Webcaster I CARP and Librarian rejected in the last proceeding. Joint DiMA/Br. Conc. ¶¶ 30-31.

6. Indeed, as support for their legal argument, DiMA and the Broadcasters focus once again on the testimony from the 2001 proceeding of a law professor who claimed that Congress intended the willing buyer/willing seller standard to mean that webcasters should not pay "full fare." Joint DiMA/Br. Conc. ¶ 52. Not only is that claim — which is once again at the heart of the webcasters' argument — wholly inconsistent with the plain language of the DMCA, but it is particularly egregious given that it was this exact testimony that led the Register to issue a ruling making clear that the willing buyer/willing seller is the only standard, and that the other policy consideration that webcasters — in 2001 and now — sought to introduce into the

proceeding were antithetical to the statute Congress had enacted. Order of the Register (July 16, 2001).

7. The webcasters' legal argument is flawed for other reasons, as well. It is based on a selectively quoted snippet of a single sentence in the Librarian's decision, which DiMA and the Broadcasters hope to use to create the misimpression that the Librarian was mandating a particular level of "competition" or that the market should be a market other than the one that would exist in the absence of a compulsory license. When one reads the entire sentence and then examines the context in which it appears, it is clear that the Librarian was doing nothing of the kind.

8. First, the quoted sentence, read in its entirety but italicizing the portion that the webcasters selectively quote, appears in a paragraph of the Librarian's decision that merely sought to describe the ruling of the CARP:

> In this configuration of the marketplace, the willing buyers are the services which may operate under the webcasting license (DMCA-compliant services), the willing sellers are record companies, and the product consists of a blanket license from each record company which allows use of that company's complete repertoire of sound recordings. Report at 24. Because of the diversity among the buyers and sellers, the CARP noted that one would expect "a range of negotiated rates," and so interpreted the statutory standard as ***"the rates to which, absent special circumstances, most willing buyers and willing sellers would agree" in a competitive marketplace***. *Id.* at 25.

67 Fed. Reg. 45240, 45244-45 (2002) (footnote omitted) (emphasis added).

9. It is thus clear that the paragraph was not prescriptive at all. It first described the fact that the CARP had decided that the hypothetical marketplace is exactly as SoundExchange still contends it is: the existing record companies selling blanket licenses to the existing

webcasters in the absence of a statutory license. Then the Librarian described how the CARP had dealt with a subsidiary issue — the fact that a series of free-market negotiations likely would not all arrive at exactly the same rate. The Librarian noted that the CARP had resolved that problem by saying that the rate selected would be the one that would be produced in "most" market negotiations. There is no reason to expand the word "competitive" in the sentence, as it is apparent that it was being used by the Librarian just as an alternative way to describe the fact that this diversity of negotiated outcomes would occur in an unregulated or free market. Indeed, the Librarian's language, fairly read, makes clear that real agreements negotiated in the marketplace between real companies are what the willing buyer/willing seller standard was intended to replicate.

10. Certainly there is not the slightest indication that the use of the word "competitive" was intended as a ruling that the existing structure of the record industry is insufficiently competitive and thus cannot be used in the hypothetical marketplace for setting webcasting rates. That is a pure fabrication by the webcasters.

11. Second, any doubt on this score is allayed by reading the next paragraph of the Librarian's decision. It says that the webcasters took issue with the CARP's analysis of the hypothetical marketplace as one in which the existing record companies sell blanket licenses to the existing webcasters: "They argue that the willing sellers should be considered as a group of hypothetical 'competing collectives each offering access to the range of sound recordings required by the Services,' and not, as the [CARP] contends, viewed as individual record companies." *Id.* at 45245. But the decision of the Librarian then ***flatly rejected*** this alternative and upheld the CARP's understanding of the hypothetical marketplace as the correct one: "[T]he Register rejects the Webcasters' challenge to the Panel's definition on this point and ***adopts the***

Panel's characterization of the relevant marketplace . . . ." *Id.* (emphasis added). That is the mandate from the Librarian that is binding here, and no efforts by the webcasters to evade it can change that reality.

12. As discussed in more detail in SoundExchange's proposed findings of facts and conclusions of law, this fundamental legal flaw infects the entirety of all of the webcasters' cases — all of whom rely on the musical works rate and Dr. Jaffe's incorrect vision of the market. Indeed, Dr. Jaffe concedes that, if the DMCA did not exist, and record companies and webcasters were permitted to negotiate licenses in the market, rates would be above what he proposed. Jaffe Reb. Test. at 213-15. That demonstrates clearly that Dr. Jaffe — and all of the webcasters — are seeking to apply the wrong legal standard in this proceeding.

2. DiMA's and the Broadcasters' Definition of the Hypothetical Market Is Fundamentally Flawed for Additional Reasons.

13. Moreover, as addressed in SoundExchange's Proposed Conclusions of Law at ¶¶ 10-47, there are a number of sound reasons why the hypothetical market should be conceived as the existing record companies selling blanket licenses to the existing webcasters. As an initial matter, nothing whatsoever in the statute even hints that the "sellers" in the hypothetical marketplace should be any different from the sellers that would exist if there were no compulsory license. *See, e.g., United States v. Cartwright*, 411 U.S. 546, 551 (1973) ("'The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.' [citing regulation] The willing buyer-willing seller test of fair market value is nearly as old as the federal income, estate, and gifts taxes themselves, and is not challenged here."). Nor is there a hint in the statute of any antitrust-like concerns about

concentration in the record industry. To the contrary, Congress repeatedly provided that the Judges should base their rates set in voluntary marketplace deals. SX Conc. ¶ 10(a). Those deals, almost by definition, would have to have been made by existing record companies licensing large catalogs of sound recordings.

14. The record of the Webcaster I CARP illustrates the relevance of marketplace deals. The CARP based its rate on a voluntary deal between the RIAA, negotiating on behalf of the record industry, and Yahoo!. That reliance was challenged both before the Librarian and in the D.C Circuit on the ground that the RIAA had too much market power, but the CARP's ruling was upheld. *See* 67 Fed. Reg. 45245-46 (Librarian's decision); *Beethoven.com LLC v. Librarian of Congress*, 394 F.3d 939, 951-52 (D.C. Cir. 2005).

15. Indeed, one principle well-established in Webcaster I was that marketplace deals made by companies with only tiny market shares (and thus little bargaining power) are *not* particularly useful as a way to determine the rate that should be set under the compulsory license. The CARP rejected reliance on deals made between RIAA and 25 small webcasters on the ground that these small operators lacked the bargaining power of larger webcasters and that ruling was affirmed by the Librarian. 67 Fed. Reg. at 45248 (Librarian's decision). The hypothetical market urged here by the webcasters would be one in which the opposite situation would prevail: AOL, Yahoo!, Clear Channel and their competitors would be imagined to be negotiating with companies with only one or a handful of sound recordings to license. *See* Joint DiMA/Br. PFF ¶ 104. Such an approach is impossible to square with the rejection as benchmarks of deals made with small webcasters.

16. DiMA and the Broadcasters point to the rejection of the 25 deals as benchmarks as purported support for the notion that the sellers in the hypothetical market cannot be large record companies exercising market power as a result of their copyrights and market share. Joint DiMA/Br. Conc. ¶¶ 32, 45. Yet the problem with these deals in Webcaster I was not market power on the seller side but the complete *lack* of market power on the buyer side — precisely the situation that DiMA and the Broadcasters are trying to replicate in reverse. *See* 67 Fed. Reg. at 45248 (Librarian's decision) ("Thus, the CARP could only consider negotiated rates for the rights covered by the statutory license that were contained in an agreement between RIAA and a Service [Yahoo!] with ***comparable resources and market power***.") (emphasis added).

17. Another fundamental flaw in the webcasters' proposed "competitive" market — leaving aside its complete lack of any basis in the statute and its conflict with binding precedent — is that once you start imagining a record industry less concentrated than the current one, it is impossible to find a logical stopping place. Competition is a matter of degree. As Dr. Brynjolfsson made clear, there certainly would be competition in a market where the existing record companies license performance rights to noninteractive webcasters. Price would be disciplined because (1) record companies would compete for "plays" by webcasters in order to earn royalties, and (2) a record company that asked too high a price would risk having a webcaster simply operate without its catalog. SX PFF ¶¶ 24, 192, 201-05, 207. For that reason, DiMA and the Broadcasters are simply wrong to suggest, as they do, *see* Joint DiMA/Br. Conc. ¶ 38, that there is no difference between negotiations by separate record companies and negotiations by a centralized representative of the entire record industry.

18. Certainly the "stopping place" urged by the webcasters — a market of thousands of individual sellers with one or a handful of songs to license negotiating with the small number

of webcasters who dominate that industry, *see* Joint DiMA/Br. PFF ¶ 104 — would go too far. This would effectively negate the grant of copyright protection to sound recordings that Congress decided was needed in this marketplace. A copyright, after all, is designed to create some amount of market power in order to establish incentives for the production of new imaginative works. But the agenda of the webcasters, in this proceeding and the Webcaster I CARP, has been to avoid the levels of compensation that copyrights are designed to produce.

19. An additional problem with the webcasters' proposed "competitive" hypothetical market is that it would amount to changing the rules in the middle of the game. SoundExchange relied on the clear precedent establishing that the sellers in the hypothetical market are existing record companies. It presented expert testimony from Dr. Pelcovits and Dr. Brynjolfsson that was crafted to estimate the rate that would be produced in that hypothetical market. DiMA and the Broadcasters, by contrast, knew that they could not defend a rate remotely close to the current rate (let alone below it) if they followed that precedent. So they pretended the law favored them and presented expert testimony utterly irreconcilable with well settled precedent, fighting the same battle they lost in Webcaster I. They should not be rewarded for such tactics.

20. The remaining arguments by the webcasters for the "competitive" market paradigm fare no better. They appeal to "basic economic principles" favoring competitive markets, which they define as markets in which "multiple sellers offer[] substitute goods." Joint DiMA/Br. Conc. ¶ 35. But what Congress actually chose to do was to grant a *copyright*, which is designed to give sellers *exclusive* control of their products, preventing anyone else from selling the same product, and thus to create market power that will reward creative activity. *Compare* Joint DiMA/Br. Conc. ¶ 45 (describing a "hypothetical competitive market" as one "where buyers have ***multiple*** sellers from whom to purchase the rights in question") (emphasis added).

21. Citing nothing more than a squib from legislative history anticipating that rates set for noninteractive webcasting will be "reasonable," DiMA and the Broadcasters suggest that Congress intended to incorporate by reference the entire jurisprudence of the "rate court" administering the ASCAP and BMI consent decrees. Joint DiMA/Br. Conc. ¶¶ 39-46. That is a fanciful notion. Congress in fact specifically rejected a "reasonableness" standard of the kind it had employed for otherwise-comparable licenses for preexisting subscription services and satellite services. *Compare* 17 U.S.C. § 114(f)(2)(B) *with* 17 U.S.C. § 801(b)(1). Moreover, Congress also provided that rates and terms from these proceedings were to have no effect whatsoever on rate court proceedings, thus making clear that it did not intend for the musical works rate and the sound recording rate to be coupled forever, as the webcasters would have it. 17 U.S.C. § 114(i).

22. Moreover, to the extent that the PRO consent decrees reflect concerns about market power, that is because the PRO market is vastly *more* concentrated than the sound recording market, with 95% or more of the sellers having banded together to sell through just two agents, ASCAP and BMI, raising serious antitrust concerns. The fact that the Department of Justice sought to prevent the record industry from duplicating such cartels hardly means that the Department — let alone Congress — intended Section 114 to eliminate the lesser bargaining power that comes with accumulating a sufficiently significant share of copyrighted sound recordings such that a record company becomes a significant player in the industry. It is one thing to say that the law should not allow the record companies to form their own cartel to negotiate rates unreviewable by any court. *See* Joint DiMA/Br. Conc. ¶¶ 47-48. It is quite another to read Section 114 as if it constituted a determination that the existing record industry is too concentrated for the individual record companies to be viewed as the willing sellers in the

hypothetical marketplace. Indeed, if Congress believed that to be the case, one wonders why it sought to remedy the situation *only* with regard to noninteractive webcasting, leaving unregulated all of the negotiations for royalties between record companies and companies engaging in all other forms of distribution of sound recordings.

23. DiMA and the Broadcasters cite a passing reference by John Simson to a "hypothetical competitive market," Joint DiMA/Br. Conc. ¶ 49, but here again it is clear that he, like the Librarian, was using "competitive" as a synonym for a free or unregulated market. He certainly was not endorsing the notion that the willing sellers are not the existing record companies. In any event, he is a fact witness, and his testimony is not binding legal authority.

24. DiMA and the Broadcasters also argue that the CARP in Webcaster I did not assess the degree of market power exercised by the record companies. But it did not have to, because it read the statute as mandating that the existing record companies are the willing sellers. CARP Report at 24 ("Thus, the panel perceives the Section 114(f)(2) hypothetical marketplace as one where the buyers are DMCA-eligible . . . services, the sellers are record companies, and the product being sold consists of blanket licenses for each record company's repertory of sound recordings."); *see id.* at 23 ("[W]e can see no Copyright Office or Copyright Royalty Tribunal precedent for the Services' 'competitive market' construct in the compulsory license context.") And the legal ruling was affirmed, thus making it binding here.

25. Moreover, the CARP had before it Dr. Jaffe's testimony about the market power of large record companies but held that "no record evidence supports" the proposition that "the record companies themselves, or even the majors, exert oligopolistic power." CARP Report at

23. Neither Dr. Jaffe nor the webcasters have provided any persuasive evidence in this proceeding to support their claims of oligopoly.

26. Finally, it is pure sophistry for DiMA and the Broadcasters to point out that the CARP "did not rely on a single agreement between a licensee and an individual label as a benchmark." Joint DiMA/Br. Conc. ¶ 51. The deals made by individual record companies that were offered into evidence did not involve noninteractive webcasting but interactive services. Moreover, unlike in the testimony of Dr. Pelcovits, no effort had been made to adjust the rates in those deals to reflect this difference. And the evidence was rejected by the CARP for that reason alone, *see* CARP Report at 71 — not because of any concern that individual record company deals are infected with excessive market power on the seller side.

C. DiMA's and the Broadcasters' Arguments About Promotion Are Legally Invalid.

27. The discussion of promotion in the Joint Proposed Conclusions of Law of DiMA and the Broadcasters asks the Judges to treat the net promotional value of webcasting (if any) as an "absolute" — *i.e.*, without "compar[ing] or counterbalanc[ing] this impact against any value received by the services in return for the labels' extensive promotional efforts." Joint DiMA/Br. Conc. ¶¶ 58, 60. That is fallacious.

28. As discussed in SoundExchange's Proposed Conclusions of Law at ¶¶ 4-6, binding precedent makes clear that the statutory reference to promotion and substitution in 17 U.S.C. § 114(f)(2)(B) does not supplant the single, market-based willing buyer/willing seller standard. *See also* SCW Conc. ¶ 5 ("The willing buyer/willing seller standard in Section 114(f)(2)(B) is to reflect strictly fair market values."). Rather, this factor is to be considered in assessing how the negotiation between the willing buyer and the willing seller would come out.

As the Register and the Librarian has made clear, the statutory factors are non-exclusive and to be considered along with any other factors that might influence the willing buyer/willing seller standard. They are not separate and independent criteria. July 16, 2001 Order of the Register at 5.

29. It follows that the Judges should not unduly emphasize this additional factor or, more importantly, ignore other considerations that would affect the bargaining of the willing buyer and the willing seller. One such additional consideration would be precisely what DiMA and the Broadcasters ask the Judges to ignore: the benefits received by webcasters from the promotional efforts of record companies, including free music, free exclusive content like interviews and concerts, and the additional customers that the promotional efforts generate. *See* SX PFF Section IX.D.2.b.

30. To ignore those benefits would be to apply a willing buyer/willing seller unconnected from any rational economic marketplace. Yet that is what DiMA and Broadcasters each now argue, claiming that 1) it is irrelevant how much money webcasters can and do earn from webcasting because such information is irrelevant to the willing buyer/willing seller standard, *see* Broadcaster PFF ¶ 267; Broadcaster Conc. ¶ 28; and 2) the CRJs cannot consider "any value received by the services" as part of comprehensive promotional efforts by sound recording copyright owners. DiMA/Br. Joint Conc. ¶ 52. Both arguments are ludicrous on their face.

31. With respect to promotion/substitution, DiMA and the Broadcasters also argue that Congress's direction to consider promotional benefits requires the Judges to award copyright owners and performers only sufficient royalties to offset demonstrated losses as a result of

webcasting. DiMA/Br. Joint Conc. ¶ 60. That is a tacit attempt to undermine the willing buyer/willing seller standard because it is essentially an argument that copyright owners and performers should receive only compensation to offset other sales, not the fair market value that would be negotiated in the marketplace. Nothing in the statute suggests that "only enough to offset losses" is the royalty rate standard, and indeed, Services have introduced no evidence to establish such a claim.

32. In response to Dr. Brynjolfsson's testimony that there is no evidence that has been offered by webcasters concerning the net promotional/substitutional effect of webcasting, that any promotional benefit from webcasting is confined to a very few sound recordings at any one time, and that promotion should therefore be accounted for in private deals involving those few sound recordings, the Broadcasters offer meritless legal arguments. They claim that such an approach would violate the statutory requirement that promotion be considered in setting rates. Broadcaster Conc. ¶ 7. But as discussed above, promotion is relevant only to the extent that it would affect the willing buyer/willing seller negotiations for a *blanket* royalty rate. Dr. Brynjolfsson's point was that there is no evidence that it would and that marketplace evidence shows that it is handled on a case-by-case basis. The Broadcasters also claim that individual deals relating to promotion of particular sound recordings would be unlawful. Broadcaster PFF ¶¶ 85-86. But such deals are made every day in webcasting, as record companies barter with webcasters, providing free exclusive content in return for promotional efforts by the webcasters. There is no support for the proposition that such an arrangement is illegal.

D. DiMA's and the Broadcasters' Arguments About Relative Contributions, Capital Investment, and Risk Are Legally Invalid.

33. As DiMA and the Broadcasters note, Section 114(f)(2)(B) also requires consideration of the "relative creative contribution, technological contribution, capital investment, and risk" of record companies and webcasters. Here again, however, they offer an incorrect characterization of what the statutory reference means. DiMA and the Broadcasters assert that "when applying this factor, the Judges should not consider expenses and contributions that do not relate specifically to webcasting, such as the expenses a record company might incur in creating a sound recording in the first place." Joint DiMA/Br. Conc. ¶ 67. That is not a fair reading of the statute.

34. To the contrary, such a reading seems carefully designed to assure that the webcasters' contributions, expenses, and risk are considered while the corresponding contributions, expenses, and risks of record companies and performing artists are ignored. Noninteractive webcasting is just one mode of distribution for a record company, but it may be the sole business of a webcaster. It follows that if one applies the webcasters' proposed standard — that contributions, expenses, and risks are relevant only if they "would not have been made if [noninteractive] webcasting did not exist," Joint DiMA/Br. Conc. ¶ 65 — the contributions, expenses and risks associated with operating a sound recording company are bound to be ignored. Thus, the interpretation offered by DiMA and the Broadcasters would have the effect of rendering the statute's reference to the contributions, investments, and risks of "the copyright owner," *see* 114(f)(2)(B)(ii), virtually meaningless.

35. This indefensible approach leads DiMA and the Broadcasters to the remarkable conclusion that the "creative content of the sound record itself" — the very product that makes

webcasting possible — "should not be considered here." Joint DiMA/Br. Conc. ¶ 68. Similarly, we are told that only those capital investments that would not have been made in the absence of webcasting should be considered. *Id.* ¶ 70. Ultimately, this is just a variant of Dr. Jaffe's fallacious argument that a willing seller in the hypothetical marketplace for webcasting royalties would not consider the costs of making and promoting sound recordings because those costs are "sunk." As Dr. Brynjolfsson testified, such expenses are not "sunk" at all, because many of the sound recordings that will be webcast in the next five years have yet to be produced. SX PFF ¶¶ 467-68.

36. The language of the statute itself forecloses this § 114(f)(2)(B) argument. Under the statute, the CRJs are directed to consider "the relative roles of the copyright owner and the transmitting entity in the copyrighted work and the service made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, and risk." 17 U.S.C. § 114(f)(2)(B)(ii). In considering this factor, Congress directed consideration of both the role in creation of "the copyrighted work" and the dissemination of the "service." That is the way the Webcaster I CARP interpreted the standard, Webcaster I CARP Report at 35, and certainly the way willing buyers and willing sellers would consider their contributions in the marketplace.

37. Broadcasters try to read "copyrighted work" out of the statute by suggesting that the Court should ignore all of the labor, investment, and effort that goes into creating and marketing copyrighted works. Broadcasters PFF ¶¶ 103-07. That is tantamount to saying that a willing seller would go into a free market negotiation valuing its property and creative contributions at zero. Logic and the plain language of the statute foreclose such an argument.

E. DiMA and the Broadcasters Offer Erroneous Legal Conclusions Relating to Their Proposed Musical Works Benchmark.

38. DiMA and the Broadcasters propose that the Judges conclude that their musical works benchmark "has been validated as a benchmark for the sound recording performance [rate] in other proceedings." Joint DiMA/Br. Conc. ¶ 78. They cite the 1998 PES ruling of the Librarian, 63 Fed. Reg. 25394 (May 8, 1998). But the insignificance of that ruling was explained in detail by the Librarian in Webcaster I. The Librarian there noted that "the only reason the Register and the Librarian [in 1998] focused on the musical works benchmark was because it was the only evidence that remained probative after an analysis of the Panel's decision. Each of the other benchmarks possessed at least one fatal deficiency . . . ." 67 Fed. Reg. at 45247. The Librarian also cautioned against giving much weight to the PES precedent, in light of the very different statutory standard applicable in that context:

> The difference in the rates is also attributable to the different standards that govern each rate setting proceeding. . . . [T]he standard for setting rates for [PES] services is policy based and not dependent on market rates. Consequently, it is more likely that the rates set under the different standards will vary markedly, especially when rates are being set for a new right in a nascent industry.

67 Fed. Reg. at 45247.

39. DiMA and the Broadcasters note that the Librarian in Webcaster I did not preclude reliance on musical works as a benchmark as a matter of law, provided a persuasive model could be developed. Joint DiMA/Br. Conc. ¶ 79. But they neglect to note that the CARP, having heard evidence very similar to that offered here, found major theoretical flaws in the benchmark:

> The Panel agrees with RIAA that the market for performance of musical works is distinct from the market for performance of sound recordings. Musical works and sound recordings do not compete in the same market, and they have different cost and demand characteristics. Moreover, the Panel rejects Dr. Jaffe's premise that the value of performance rights in sound recordings are necessarily no greater than in musical works because costs are "sunk." This view assumes (erroneously in our view) that sound recording owners have a static perspective and do not consider the costs of developing new sound recordings when negotiating fees.

CARP Report at 41 (citations omitted).

40. Thus, the argument by DiMA and the Broadcasters is nothing more than an attempt to fight the same fight that the webcasters fought — and lost — in the previous proceeding.

II. PROPOSED CONCLUSIONS OF LAW RESPONSIVE TO THE SEPARATE PROPOSED CONCLUSIONS OF LAW OF THE BROADCASTERS

41. The Broadcasters offer separate proposed conclusions of law ("Broadcaster Conc.") in which they argue for a separate lower rate for simulcasters. First, they suggest that because record companies spend considerable sums to promote play of sound recordings on terrestrial radio, the Judges should conclude that terrestrial radio, and therefore simulcasting, are hugely promotional. Broadcaster Conc. ¶¶ 1-6.

42. The Broadcasters also point to the evolution of copyright protections as an argument for special treatment. But their depiction of this history is beside the point, as well as deceptive. The reality is that, whatever Congress's policy in 1909, 1925, and 1971 was with respect to sound recordings and over-the-air broadcasting (Broadcaster PFF ¶¶ 24-31), Congress in 1995 and 1998 definitively determined that, if Radio Broadcasters wanted to (as they have)

expand into the new business of streaming sound recordings over the Internet, they would be subject to the same rules and same willing buyer/willing seller standard as every other webcaster.

43. Indeed, the very differences that the Broadcasters identify as distinguishing them from other webcasters were rejected by Congress in the DMCA in 1998. The Broadcasters' complaints about the legislative process in 1998 (Broadcaster PFF ¶¶ 32-35) attempt to obscure the outcome: Congress made the express and specific determination that Broadcasters should be subject to the same standard as every other webcaster. As the Third Circuit held in rejecting very similar arguments that the Broadcasters made to be exempted altogether from royalty payments,

> If, as the broadcasters protest, congressional intent were simply to protect the broadcaster-recording industry relationship wherein "the sale of sound recordings has been promoted by the airplay decisions of radio broadcasters," what possible purpose could be served by distinguishing between different purveyors of that exact same airplay decision?

Bonneville Int'l Corp. v. Peters, 347 F.3d 485, 496 (3d Cir. 2003).

44. The district court in the *Bonneville* litigation was even more clear in explaining the fallacy of the Broadcasters' argument here, as well as the concern Congress had that digital audio transmissions from the Broadcasters threatened the traditional business of sound recording copyright owners:

> The fact that the original limited public performance right that was created in 1995 was not intended to upset the mutually beneficial relationship between recording and traditional broadcast industries does little to support the Plaintiffs' reading of the Copyright Act. While it is true that broadcasters traditionally have not been subject to any public performance right for using a recording in an AM/FM broadcast, the streaming of broadcasts over the Internet is not part of the traditional practices of AM/FM broadcasters which form the basis of their traditional relationship with the recording industry. Internet streaming by AM/FM broadcasters is entirely

> different from traditional over-the-air broadcasting because it is global in nature, as opposed to being limited to geographically defined areas, and because the digital nature of the transmissions, as opposed to the analog nature of traditional over-the-air broadcasts, significantly enhances the ability to create high-quality copies from the transmissions. The global nature and the enhanced quality of the transmissions increase the likelihood that record sales could be affected by the streaming of AM/FM broadcasts.

Bonneville Int'l Corp. v. Peters, 153 F. Supp. 2d 763, 778 (E.D. Pa. 2001).

45. The Broadcasters emphasize that they are neither interactive nor offering niche stations, thus suggesting that they are less likely than other webcasters to substitute for CD sales. Broadcaster Conc. ¶ 15. But any suggestion that all Congress was concerned about with respect to substitution was Internet-only webcasters is refuted directly by the Copyright Office's prior rulings. In rejecting the arguments made by the Broadcasters that they should be treated differently from Internet-only webcasters, the Copyright Office found that the DMCA

> subjects all other digital transmissions made by a noninteractive, nonsubscription service to the terms and conditions of the statutory license in order to compensate record companies for the increased risk that a listener may make a high-quality unauthorized reproduction of a sound recording directly from the transmission instead of purchasing a legitimate copy in the marketplace, a risk that is clearly greater when the recipient is receiving the transmission on a computer, which can instantly replicate and retransmit the transmission.

65 Fed. Reg. 77292, 77301.

46. And the Copyright Office held that, in enacting the DPRA and DMCA to advance of the primary purpose of "ensur[ing] that recording artists and recording companies will be protected as new technologies affect the ways in which their creative works are used," 65 Fed. Reg. 77292, 77301 (quoting House Manager's Report to the DPRA at 49), Congress focused on the transmission, not the nature of the transmitters, "evaluat[ing] the potential for displacement

of record sales on the basis of the characteristics of those transmissions and appl[ying] the statutory restrictions and exemptions accordingly." 65 Fed. Reg. 77292, 77301.

47. Finally, the Broadcasters, in the face of overwhelming evidence of their economic success in the marketplace, *see* SX PFF Section VII, have changed their tune regarding the legal relevance of their revenues to the willing buyer/willing seller standard. Having started off this proceeding by arguing that they should pay lower rates because they were losing money on simulcasting, the Broadcasters now argue that the huge profits they have begun to earn should be ignored because they would not affect price negotiations in a free market. Broadcaster PFF ¶ 267; Broadcaster Conc. ¶ 28. That assertion is incorrect because it assumes that the willing seller is not entitled — even to negotiate for — any of the additional consumer value generated by exploitation of the seller's works.

48. The Broadcasters go on to make a variety of factual assertions about differences between simulcasters and Internet-only webcasters, dressed up as conclusions of law. Broadcaster Conc. ¶¶ 12-27. But as we have demonstrated, *see* SX PFF Section XI.D, the record does not justify drawing that distinction for rate-setting purposes, because those two industries compete with one another and are converging.

III. PROPOSED CONCLUSIONS OF LAW RESPONSIVE TO THE JOINT NONCOMMERCIAL PROPOSED CONCLUSIONS OF LAW

49. The joint proposed conclusions of the noncommercial broadcasters ("Joint Noncomm. Conc.") seek to concoct a legal argument that the Judges are mandated by Congress to set a separate, lower rate for noncommercial webcasting. They rely on the language of Section 114, the precedent from the Webcaster I CARP, and analogies to other statutes. None of these approaches demonstrates that the Judges are obligated to set a special noncommercial rate

if they conclude, based on the evidence, that a willing seller in the hypothetical market would not do so.

A. The Statute

50. First, contrary to the argument presented in Joint Noncomm. Conc. ¶ 107, Section 114(f)(2)(A) does not, itself, direct that there must be a separate noncommercial rate. It says that the rates "shall distinguish among the different types of eligible nonsubscription transmission services then in operation." But without more specifics, that language can only be read as saying that the Judges should consider whether differential rates are warranted for different categories of services. *See also* SCW Conc. ¶ 7 ("So long as record evidence supports the distinction, different rates *may be permissible* for services that are differently situated due to the value they derive from webcasting sound recordings.") (emphasis added). One cannot extract from this language a mandate to (1) identify noncommercial stations as a separate category, and (2) give them a special rate, regardless of what the evidence shows. To the contrary, Congress was silent about whether there existed relevant subcategories and what they might be.

51. Any other reading would be inconsistent with the willing buyer/willing seller standard. Under a policy-based standard, Congress might choose to direct the Judges to give a special deal to a category of webcasters. But it would not make sense for Congress simultaneously to set a *market*-based standard and then prejudge how the market would set rates in advance of analysis of the relevant facts.

52. Indeed, it is fair to say that the noncommercial stations' argument for a special rate is largely a plea to adopt policies not consistent with the Section 114(f)(2)(B) willing buyer/willing seller standard. We see reference, for example, to the Public Broadcasting Act and

the subsidies that public broadcasters receive from the federal government. Joint Noncomm. Conc. ¶ 109. *See also* SCW PFF ¶ 7 (arguing that small commercial webcasters deserve a lower rate because they are "altruistic"). But nothing in Section 114 suggests that owners of sound recordings and artists should be forced to provide subsidies as well by being told they must sell the rights to webcast sound recordings for a rate lower than they would charge in a free market.

53. The noncommercial stations present a litany of other reasons why they would not be willing buyers if the rate applicable to them were the same as the commercial rate. Joint Noncomm. Conc. ¶¶ 124-27. *See also* SCW Conc. ¶ 11 (arguing that because of lower rates, small commercial webcasters should be treated as a "separate class of willing buyer"). But in so doing, they ignore completely the question whether a wiling seller would choose to create a special subsidized rate for noncommercial stations, notwithstanding the danger of cannibalization and notwithstanding the fact that noncommercial stations presumably pay the commercial rate for many other expenses, ranging from bandwidth to office supplies, to furniture, etc.

54. Ignoring what the willing seller would do might make sense if the statutory standard were a policy-based one under which rates are to be set low enough to keep existing webcasters in operation. But that is not what Section 114(f)(2)(B) says. *Compare* 17 U.S.C. § 114(f)(2)(B) ("the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller") *with id.* § 801(b)(1) (the policy-based standard applicable to other compulsory licenses) (rates calculated, *inter alia*, to "maximize the availability of creative works to the public" and "minimize any disruptive impact on the structure of the industries involved"). In a free market, buyers cannot insist on paying the price they would prefer or even the price that they need to pay to stay in operation, if it has not been offered.

B. Arguments by Analogy

55. The implicit "policy-based" nature of the noncommercial stations' plea for a special lower rate is also reflected in their heavy reliance on an analogy to the Section 118 license. Joint Noncomm. Conc. ¶¶ 110-12, 117-20. Because that compulsory license, which covers, among other things, the performance of musical works by noncommercial educational broadcasters, was designed solely for noncommercial stations, and the section does not mandate a willing buyer/willing seller standard, it makes sense for the noncommercial stations to argue that *that* license was designed to promote their "nonprofit mission," to reflect their "ability to pay," and to assure that they "continue providing socially desirable programming." Joint Noncomm. Conc. ¶¶ 110-11.

56. But the fact that Congress deliberately set out to mandate a special deal for noncommercial stations in Section 118 only serves to dramatize how differently it acted in Section 114 with regard to noninteractive webcasting of sound recordings. Congress knew how to mandate a special rate geared to the ability to pay of nonprofit operators. It simply did not do so in the current context. For that reason, the Judges should reject out of hand the noncommercial stations' later suggestion that the Section 118 rates, covering ***musical works*** rather than sound recordings and applying a ***different legal standard***, are an appropriate benchmark for this proceeding. *See* Joint Noncomm. Conc. ¶¶ 130-31.

57. Moreover, it should be noted that in Section 118, Congress rejected an across-the-board exemption or discount for noncommercial stations, opting instead for targeted exemptions for specific uses. In that process, the same House report cited by the noncommercial stations, Joint Noncomm. Conc. ¶ 111, stated as follows:

> The right of public performance under section 106(4) extends to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings" and, unlike the equivalent provisions now in effect, is not limited by any "for profit" requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.
>
> This approach is more reasonable than the outright exemption of the 1909 statute. ***The line between commercial and 'nonprofit' organizations is increasingly difficult to draw. Many "non-profit" organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit " exemption could not only hurt authors but could dry up their incentive to write.***

H.R. Rep. 94-1476, at 62-63 (Sept. 3, 1976).

58. The next analogy the noncommercial stations draw is to the Small Webcaster Settlement Act. Joint Noncomm. Conc. ¶¶ 112-14. *See also* SCW Conc. ¶¶ 8-9. But that Act was time-limited, 17 U.S.C. §114(f)(5)(A), and expressly provided that the rates prevailing under it were non-precedential, *id.* § 114(f)(5)(C). Clearly it was intended to be transitional rather than a permanent mandate of special status for noncommercial stations. Indeed, it was not limited to noncommercial stations. Most importantly, Congress specifically provided that the SWSA rates would not be "matters that would have been negotiated in the marketplace between a willing buyer and a willing seller." *Id.* It is therefore hard to see how that Act can help the noncommercial stations in their quest for a legal mandate of a special rate ***under the willing buyer/wiling seller standard.***

59. The noncommercial stations also note that the Webcaster I CARP established a special noncommercial rate — albeit a rate much higher than they propose to pay. Joint Noncomm. Conc. ¶¶ 115-16. But it is important to recognize that the decision to do so was not challenged by RIAA before the Librarian and thus there is no binding precedent on this point. *See* 67 Fed. Reg. at 45258-59 (Webcaster I Librarian's Decision) (describing challenges to the CARP's noncommercial rate, all of which were unsuccessfully pursued by webcasters seeking to lower it).

60. Moreover, the CARP's statement that "common sense" demands a lower noncommercial rate is not a very persuasive non-binding precedent given that the CARP relied on a prior CARP ruling applying the same Section 118 license discussed above. CARP report at 89 (citing CARP report from Noncommercial Educational Broadcasting Compulsory License Proceeding, 64 Fed. Reg. 49823 (1998)). As the noncommercial stations go on to note later in their proposed conclusions, Joint Noncomm. Conc. ¶¶ 117-20, the Section 118 CARP rejected the argument that noncommercial stations should have to pay the commercial rate, but it did so in applying a compulsory license created especially for noncommercial educational stations ***that does not contain a willing buyer/willing seller standard.*** Here again, it is the differences between what Congress did there and what it did in drafting Section 114(f)(2)(B) that are key.

61. In sum, the noncommercial broadcasters are simply wrong that they have a legal right to special treatment. The issue presented here is whether in a free market they would receive such a special deal.

62. In addressing that question, the CRJs should take account of several facts that are undisputed in the record:

63. *First*, even at SoundExchange's commercial rates, the moneys owed by small religious and college stations would be relatively trivial. SX PFF ¶¶ 1193-95.

64. *Second*, those noncommercial stations, like some NPR stations, that would owe more also have much greater ability to pay and use a great deal more music. SX PFF ¶¶ 1129-56. What is stunning about the noncommercial services' arguments is that they say services that use less music should pay less in fees, Joint Noncomm PFF at 13 ("It is beyond dispute that services such as Noncommercial Broadcasters that use less music should pay less in sound recording performance royalties"), but they then propose rates that do not depend on music usage and thus allow large noncommercial services to pay very little.

65. *Third*, the poverty pled at least by college stations is largely a function of choice. They are affiliated with institutions that spend large sums of money educating students. They may not choose to pay commercial rates for webcasting if that is the choice they are offered. But that cost will be miniscule compared to what they do choose to expend on other "educational" extracurricular activities such as intercollegiate athletics.

66. *Fourth*, that noncommercial stations may have noncommercial motives is not a reason for a discounted rate, but an explanation for why they, in a free market, would be price takers of the price that would otherwise prevail in the market. To the extent that a noncommercial entity may choose or not choose to make an investment in student education or spreading religious teachings, they have to do so paying the rates that are otherwise determined in the marketplace. Brynjolfsson WRT at 40. That result is compelled by the willing buyer/willing seller standard, and Noncommercial Broadcasters have provided no evidence to the contrary.

IV. ADDITIONAL FLAWS THAT INFECT WEBCASTERS' BENCHMARKS AND RATE PROPOSALS

67. The fundamental flaw that runs through all of the webcasters' benchmarks is the reliance on the rates and terms for musical works. As discussed in detail elsewhere in SoundExchange's filings, these flaws compel rejection of all of the webcasters' benchmarks. But there are other flaws as well that, as a matter of law, infect various of the benchmarks.

68. First, numerous of the benchmarks proposed by webcasters relate to complex negotiations not simply for Internet streaming, but for other rights, such as rights to transmit over-the-air broadcasting or music videos. DiMA's rate proposal relies on agreements (which, it is noteworthy, DiMA never put into evidence) that include rights for multiple music services, not simply streaming. Jaffe WDT at 37; DiMA PFF at 19 n. 3. The Broadcasters' rate proposal similarly is based on agreements that are overwhelmingly for over-the-air radio, not streaming.

69. As the Librarian has held previously, such agreements that are for a complex of different services are poor benchmarks because it is impossible to determine the trade-offs made by the participants. Librarian's Decision in PES I Proceeding, 63 Fed. Reg. 25394, 25402 (May 8, 1998) ("complex transactions encourage trade-offs among the various provisions and lead to results that most likely differ from what would result from a separately negotiated transaction"). This is especially true with the Broadcasters' proposed benchmark, which relies on agreements that settle litigation and royalty rates that go back all the way to 1997 and also, by their terms, do not purport to reflect fair market value for any given year. SX PFF ¶¶ 1463-75.

70. Second, the benchmarks themselves in many cases have specific language that they were intended to be non-precedential and thus could not be used as evidence in a future proceeding between the parties. *See* CBI Appendix I (CBI-SESAC agreement); Serv. Ex. 157

(NPR-SoundExchange agreement); Serv. Ex. 14 (SDARS-RIAA agreement). As the Webcaster I CARP noted, the Librarian has found such agreements "highly suspect" as benchmarks and has refused attempts to use such agreements in the past. Webcaster I CARP Report at 90 (citing decisions by the Librarian). Given that webcasters have made no additional record about some of these agreements to explain any of their rates and terms, they cannot serve as a basis for setting rates and terms in this proceeding.

V. PROPOSED CONCLUSIONS OF LAW RESPONSIVE TO THE PROPOSED CONCLUSIONS OF LAW OF RLI

71. To the extent that RLI continues to claim that its members have a unilateral statutory right to designate RLI as a "designated agent" exercising the same rights as SoundExchange, *see* RLI PFF ¶¶ 24, 38 (arguing that SoundExchange was "designated" by its affiliates and thus can exercise the rights of a "designated agent" under 17 U.S.C. § 114(g)(3)), the Judges have already rejected that contention in the June 14, 2006 Order holding that it is within the discretion of the CRJs to decide whether or not to designate multiple designated agents. *See* Order Denying RLI's Request for Referral fo Material Questions of Substantive Law, June 14, 2006.

72. The decision about whether to appoint one or more agents, and which one(s) to appoint, is governed by the willing buyer/willing seller standard. *See id.* § 114(f)(2)(B) ("rates and terms" based on willing buyer/willing seller standard). The Judges should take into account the pertinent views of record companies and artists, on the one hand, and webcasters on the other. There may not be unanimity. But in a situation where a large majority of sellers oppose multiple agents and believe, reasonably, that such an arrangement would be affirmatively

harmful to their interests, that viewpoint must be viewed as that of the "willing seller." That is certainly the case here.

73. As for the buyers, their interests are legitimately implicated only to the extent that the choice of one or more designated agents may make the process of paying royalties more or less complicated. Leaving aside that potential concern, fairness suggests that the parties for whose benefit the designated agent or agents are charged with working — the copyright owners and the artists — should play the primary role in making the decision. The record suggests that the webcasters do not have a strong position on this issue. They presented little evidence on it and do not mention RLI in their proposed findings and conclusions. Moreover, although Mr. Potter, the Executive Director of DiMA, paid lip service to the notion of multiple designated agents, he made clear that appointment of multiple agents is "not a drop-dead issue for [DiMA] in any respect." Potter Dir. Test. at 172-73. He also made clear that any support for multiple agents arose not from a belief that this would improve license administration, but from a desire to negotiate different rates and terms. Potter Dir. Test. at 173-74. That kind of concern should not be given weight. The Judges should not make a decision on this issue based on the hopes of the webcasters to *lower* payments to royalty recipients.

74. Certainly the RLI-DiMA agreement, RLI Ex. 13, does not support giving RLI status as a designated agent, contrary to RLI's contentions. RLI PFF ¶ 33. That agreement is a direct license deal, and has nothing to do with designation of designated agents under the statutory license. Moreover, it is a sham agreement, since its rate term is illusory and no DiMA member has ever chosen to be governed by its terms. SX PFF ¶ 1640. RLI induced DiMA to sign the deal by offering to endorse a very low royalty rate as reflecting the market rate. *Id.* Moreover, the deal goes a long way towards explaining DiMA's willingness even to mention the

notion of multiple designated agents — RLI has shown its willingness to support DiMA in rate and term setting proceedings (e.g., by having Mr. Gertz and Ms. Ulman testify as witnesses for the webcasters), and it appears that DiMA is willing to return the favor.

75. In any event, RLI is wrong as a matter of law when it asserts that it has a current statutory right under 17 U.S.C. § 114(g)(3) to collect royalties from SoundExchange without any deduction for the costs of SoundExchange. RLI PFF ¶¶ 24, 38, 48. That provision applies only to payments made to artists and copyright owners who have affiliated with another "designated agent." RLI has not become a designated agent.

76. Finally, although RLI claims that it has a legal right to receive copies of reports of use filed by webcasters, RLI PFF ¶ 49, here again it mistakes the difference between signing up a handful of artists or copyright owners and being named a "designated agent." The latter status must come from the CRJs.

VI. WEBCASTERS ARE FORECLOSED AS A MATTER OF LAW FROM ATTACKING THE WEBCASTER I DECISION.

77. For the reasons stated in SoundExchange's Conclusions of Law, webcasters cannot, as a matter of law, attack the decision of the Librarian in upholding the Webcaster I CARP as unreasonable or an incorrect implementation of the willing buyer/willing seller standard in 2002. Such arguments were foreclosed when that decision was rendered final with affirmance by the D.C. Circuit. Basic principles of *stare decisis* foreclose the various arguments made by webcasters.

78. Thus, Noncommercial Broadcasters' arguments at Joint Noncomm. PFF ¶¶ 71-82 and DiMA and Broadcasters' arguments at Joint DiMA/Br. PFF ¶ 75 (and the argument supporting them and those that flow from them) must be rejected.

VII. THE JUDGES SHOULD ADOPT SOUNDEXCHANGE'S REVISED RATE PROPOSAL.

79. SoundExchange's Revised Rate Proposal (filed Sept. 29, 2006), which is attached hereto as Appendix A, is the most accurate reflection of the marketplace that would exist in the absence of a compulsory license and is consistent with the willing buyer/willing seller standard. Moreover, those rates and terms reflect considerations of the relative contribution of webcasters and sound recording copyright owners, as well as the net promotion/substitutional effect of webcasters' services. It should be adopted as the rates and terms to govern for the Section 112 and 114 licenses for the period 2006 - 2010.

Respectfully submitted,

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Dated: December 15, 2006

Appendix A

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of	)	
DIGITAL PERFORMANCE RIGHT IN SOUND RECORDINGS AND EPHEMERAL RECORDINGS	)	Docket No. 2005-1 CRB DTRA

REVISED RATE PROPOSAL FOR SOUNDEXCHANGE, INC.

Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange, Inc. ("SoundExchange"), through its undersigned counsel, hereby proposes the following rates for (1) the digital audio transmission of sound recordings by eligible nonsubscription transmission services and new subscription services operating under the statutory licenses set forth in 17 U.S.C. § 114(d)(2), and (2) the making of ephemeral phonorecords necessary to facilitate transmissions by eligible nonsubscription transmission services and new subscription services, 17 U.S.C. § 112(e), during the period January 1, 2006 through December 31, 2010. Pursuant to 37 C.F.R. § 351.4(a)(3), SoundExchange reserves the right to alter or amend its rate proposal prior to submission of findings and conclusions if warranted by the record.

I. ROYALTY RATES FOR MUSIC SERVICES

A) Eligible Nonsubscription Transmission Services

Each transmitting entity providing an eligible nonsubscription transmission service ("transmitting entity" or "Licensee") shall pay a monthly fee (to cover both the 17 U.S.C. § 114(d)(2) performance license and the § 112(e)(1) license for making ephemeral copies) for its eligible nonsubscription transmission service equal to:

1) Monthly Fee. For each month, the Licensee shall calculate and report Gross Revenues and the number of performances of copyrighted sound recordings. The monthly fee shall equal the greater of a) or b) below:

a) *Revenue Share:* 30% of Gross Revenues;

or

b) *Usage Amount*: The applicable Per Play Rate multiplied by the number of performances of copyrighted sound recordings in the month (i.e., each instance where a webcaster transmits any portion of a single copyrighted sound recording to a single listener (i.e., a receiving device)) multiplied by the Adjustment Factor.

2) The Per Play Rate. The Per Play Rate during each year of the license shall equal:

Year	Per Play Amount
2006	$.0008
2007	$.0011
2008	$.0014
2009	$.0018

2010	$.0019 multiplied by the CPI Increase

3) The Adjustment Factor. The Adjustment Factor shall equal:

1 + (.25 MULTIPLIED BY the Pro Rata Share of Wireless Performances).

4) Pro Rata Share of Wireless Performances. The Pro Rata Share of Wireless Performances shall equal the total number of monthly performances terminating on a wireless device DIVIDED BY the total number of monthly performances.

5) CPI Increase. The CPI Increase shall equal the percent change in the CPI-U from December of 2005 to December 2009 (e.g., if the CPI-U is 3% each year during the license period, the Per Play Amount in 2010 shall be $.00214 per performance).

6) Minimum Annual Fee. For each year that a transmitting entity makes eligible nonsubscription transmissions under Section 114(d)(2) of the Copyright Act, the transmitting entity shall pay a non-prorated, recoupable but non-refundable minimum annual fee for each eligible nonsubscription transmission service that makes digital audio transmissions of sound recordings during the year equal to $500 per channel or station offered by the service. The annual minimum fee shall be due by January 31st of each year; provided, however, that if a service does not make any transmissions between January 1 and January 31 but thereafter commences transmissions, then the minimum annual fee shall be due by the last day of the month in which the service commences making transmissions under the statutory license. Any unrecouped balance for a minimum annual fee remaining at the end of the calendar year shall not carry forward to any subsequent year.

7) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. § 112(e)(1) for the making of ephemeral copies used solely by the eligible nonsubscription transmission service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

8) Performances Terminating on a Wireless Device. For purposes of the royalty calculation, a performance terminating on a wireless device shall include any performance transmitted over a wireless network and terminating on a cell phone, PDA or similar device; provided, however, that transmissions over a personal, short range residential wireless network, such as via a wireless router at a personal residence, shall be excluded from the calculation of the number of transmissions to a wireless device. For services that make transmissions to both fixed line devices and wireless devices, the responsibility shall be on the service to determine the number of performances terminating on a wireless device. To the extent that a service offers transmissions to both fixed line and wireless devices and the service cannot distinguish between transmissions to wireless devices and fixed line devices, the service shall pay the rate applicable to transmissions terminating on wireless devices (e.g., the Adjustment Factor shall equal 1.25).

B) New Subscription Services

Each transmitting entity providing transmissions through a new subscription service ("the transmitting entity" or "Licensee") shall pay a monthly fee (to cover both the 17 U.S.C. § 114(d)(2) performance license and the § 112(e)(1) license for making ephemeral copies) for its new subscription service equal to

1) Monthly Fee. For each month, the Licensee shall calculate and report Gross Revenues, the number of performances of copyrighted sound recordings, and the number of subscribers to the service (including free trial subscribers). The monthly fee shall equal the greater of a), b), or c) below:

a) *Revenue Share:* 30% of Gross Revenues; or

b) *Usage Amount*: The applicable Per Play Rate multiplied by the number of performances of copyrighted sound recordings in the month (i.e., each instance where a webcaster transmits any portion of a single copyrighted sound recording to a single listener (i.e., a receiving device)) multiplied by the Adjustment Factor; or

c) *Per Subscriber Minimum:* $1.37 per month for each person who subscribes to the Subscription Service for all or any part of the month or to whom the Subscription Service otherwise is delivered by Licensee without a fee (e.g., during a free trial period) multiplied by the Adjustment Factor.

2) The Per Play Rate. The Per Play Rate during each year of the license shall equal:

Year	Per Play Amount
2006	$.0008
2007	$.0011
2008	$.0014
2009	$.0018
2010	$.0019 multiplied by the CPI Increase

3) The Adjustment Factor. The Adjustment Factor shall equal:

1 + (.25 MULTIPLIED BY the Pro Rata Share of Wireless Transmissions).

4) Pro Rata Share of Wireless Transmissions. The Pro Rata Share of Wireless Transmissions shall equal the total number of monthly performances terminating on a wireless device DIVIDED BY the total number of monthly performances.

5) CPI Increase. The CPI Increase shall equal the percent change in the CPI-U from December of 2005 to December of 2009 (e.g., if the CPI-U is 3% each year during the license period, the Per Play Amount in 2010 shall be $.00214 per performance).

6) Minimum Annual Fee. For each year that a transmitting entity makes new subscription service transmissions under Section 114(d)(2) of the Copyright Act, the transmitting entity shall pay a non-prorated, recoupable but non-refundable minimum annual fee for each new subscription service that makes digital audio transmissions of

sound recordings during the year equal to $500 per channel or station offered by the service. The annual minimum fee shall be due by January 31st of each year; provided, however, that if a service does not make any transmissions between January 1 and January 31 but thereafter commences transmissions, then the minimum annual fee shall be due by the last day of the month in which the service commences making transmissions under the statutory license. Any unrecouped balance for a minimum annual fee remaining at the end of the calendar year shall not carry forward to any subsequent year.

7) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. 112(e) for the making of ephemeral copies used solely by the new subscription service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

8) Performances Terminating on a Wireless Device. For purposes of the royalty calculation, a performance terminating on a wireless device shall include any performance transmitted over a wireless network and terminating on a cell phone, PDA or similar device, provided that transmissions over a personal, short range residential wireless network, such as via a wireless router at a personal residence, shall be excluded from the calculation of the number of transmissions to a wireless device. For services that make transmissions to both fixed line devices and wireless devices, the responsibility shall be on the service to determine the number of performances terminating on a wireless device. To the extent that a service offers transmissions to both fixed line and wireless devices and the service cannot distinguish between transmissions to wireless

devices and fixed line devices, the service shall pay the rate applicable to transmissions terminating on wireless devices (e.g., the Adjustment Factor shall equal 1.25).

9) Services Covered. For purposes of this section, new subscription services shall include all subscription services that are making digital audio transmissions of sound recordings including a) subscription services that have come into existence since September 1, 2000 (the date of filing notice of petitions to participate in Docket No. 2000-9 CARP DTRA 1& 2) and b) subscription services offered by companies that also provide services that are separately licensed as preexisting subscription service ("PES") (17 U.S.C. § 114(j)(11)) or preexisting satellite digital audio radio service ("SDARS") (17 U.S.C. § 114(j)(10))), except to the extent that the activity of such companies falls within the narrow statutory licenses for a PES or SDARS.

II. BUNDLED SERVICES

A. Definition: A "Bundled Service" shall mean a service or product provided by a Licensee, or a third party on Licensee's behalf, that: (i) is eligible for a statutory license pursuant to 17 U.S.C. § 114(d)(2); (ii) is only offered to end users for a fee, other than for a limited duration on a promotional basis; and (iii) includes, as part of the end user fee, Connectivity Service (as defined below) provided by a third party that is not a parent, subsidiary, division, or affiliate of Licensee, or that otherwise controls or is controlled by Licensee. "Connectivity Service" shall mean a service or product whose primary purpose is to allow an end user to access the Internet, a cellular telephone network or such other network over or through which a sound recording is transmitted to the end user via a digital audio transmission (e.g., Internet access service or cell phone service).

Notwithstanding the foregoing, a service or product shall not be considered a Bundled Service if the sound recording transmission component of the service or product is otherwise made available on a stand-alone basis or as part of a package of services not considered a Bundled Service.

B. Each Licensee providing a Bundled Service shall pay a monthly fee (to cover both the 17 U.S.C. § 114(d)(2) performance license and the § 112(e)(1) license for making ephemeral copies) for its Bundled Service equal to:

1) Monthly Fee. For each month, the Bundled Service shall report the number of performances. The monthly fee shall equal the applicable Per Play Rate multiplied by the number of performances of copyrighted sound recordings in the month (i.e., each instance where a webcaster transmits any portion of a single copyrighted sound recording to a single listener (i.e., a receiving device)) multiplied by the Adjustment Factor.

2) The Per Play Rate. The Per Play Rate for Bundled Services during each year of the license shall equal $.002375 (adjusted each year of the term in accordance with the CPI Increase).

3) The Adjustment Factor. The Adjustment Factor shall equal:

1 + (.25 MULTIPLIED BY the Pro Rata Share of Wireless Transmissions).

4) Pro Rata Share of Wireless Transmissions. The Pro Rata Share of Wireless Transmissions shall equal the total number of monthly performances terminating on a wireless device DIVIDED BY the total number of monthly performances.

5) CPI Increase. Each year of the license period, beginning on January 1, 2007, the Per Play Rate shall increase according to the percent change in the CPI-U from the December of two year's prior to December of the prior year (e.g., the per performance rate in 2007 shall equal $.002375 times the change in CPI-U from December of 2005 to December of 2006).

6) Minimum Annual Fee. For each year that a transmitting entity makes transmissions under Section 114(d)(2) of the Copyright Act as part of a Bundled Service, the transmitting entity shall pay a non-prorated, recoupable but non-refundable minimum annual fee for each new subscription service that makes digital audio transmissions of sound recordings during the year equal to $500 per channel or station offered by the service. The annual minimum fee shall be due by January 31st of each year; provided, however, that if a service does not make any transmissions between January 1 and January 31 but thereafter commences transmissions, then the minimum annual fee shall be due by the last day of the month in which the service commences making transmissions under the statutory license. Any unrecouped balance for a minimum annual fee remaining at the end of the calendar year shall not carry forward to any subsequent year.

7) Ephemeral Fees. With respect to each of the rates specified above, the royalty payable under 17 U.S.C. 112(e) for the making of ephemeral copies used solely by the new subscription service to facilitate transmissions for which it pays royalties shall be deemed to be included within, and to comprise 8.8% of, such royalty payments.

8) Performances Terminating on a Wireless Device. For purposes of the royalty calculation, a performance terminating on a wireless device shall include any

performance transmitted over a wireless network and terminating on a cell phone, PDA or similar device, provided that transmissions over a personal, short range residential wireless network, such as via a wireless router at a personal residence, shall be excluded from the calculation of the number of transmissions to a wireless device. For services that make transmissions to both fixed line devices and wireless devices, the responsibility shall be on the service to determine the number of performances terminating on a wireless device. To the extent that a service offers transmissions to both fixed line and wireless devices and the service cannot distinguish between transmissions to wireless devices and fixed line devices, the service shall pay the rate applicable to transmissions terminating on wireless devices (e.g., the Adjustment Factor shall equal 1.25).

9) Other Types of "Bundles" -- Any other Service for which a Licensee receives receive a fee (including services bundled with other products or services that do not meet the definition of Part II.A) shall pay monthly fees as a new subscription service in accordance with Part I.B above. Any Licensee's Service that is bundled with other products or services, but also sold on an ala carte basis for a separate fee shall pay monthly fees as a new subscription service in accordance with Part I.B above.

III. ADJUSTMENT FOR NON-MUSIC SERVICES

A. Definition: "Non-music services" shall mean services that are overwhelmingly news, talk, sports, or business programming and whose programming is, when calculated based on total time spent listening (i.e. as measured by listening time of end users, not by programming), less than 25% music. In determining whether time spent listening is to music programming or news, talk, sports, or business programming, advertisements (including advertisements for the service itself or affiliates) and programming replacing over-the-air

advertisements shall not be counted (i.e. in determining the total listening time of end users for all programming, advertisements and programming replacing over-the-air advertisements shall equal 0), .

B. Non-music services shall pay in accordance with Parts I and II above, except that

1. Revenue Share. For each month in which a monthly fee is owed, Gross Revenues shall equal Gross Revenues for the Service multiplied by the Music Percentage;

2. Per Subscriber Minimum. To the extent that a non-music station is offered by a new subscription service, then for each month in which a monthly fee is owed, the per subscriber minimum portion of the calculation shall equal the Per Subscriber Minimum calculated pursuant to Section I above multiplied by the Music Percentage;

3. Usage Amount. The Usage Amount shall be calculated as described in Sections I and II (i.e., the number of performances multiplied by the applicable Per Play Rate multiplied by the Adjustment Factor)

C. The Music Percentage. The Music Percentage shall equal the total time spent listening to music programming (e.g., programming that is more than 25% music) for the month divided by the total time spent listening to the service for the month.

IV. GROSS REVENUES

A. Definition of "Service"

"Service" shall mean a product or service offered, directly or through a third party, that engages in digital audio transmissions of sound recordings that is eligible for the statutory license pursuant to 17 U.S.C. § 114(f)(2) and § 112(e), provided that, for purposes of this regulation, where the same Licensee, directly or through a third party, offers different versions of the same product, e.g., a 20-channel offering and a 100-channel offering or a commercial-free offering and

an ad-supported offering, each version of the product that differs in material respects shall be a different "Service."

B. Definition of Gross Revenues

"Gross Revenues" shall mean all gross monies and other consideration, paid or payable to or on behalf of any person or entity, that are directly or indirectly attributable to a Service (including, without limitation, non-returnable advances and guarantees). Gross Revenues for any non-cash or in-kind consideration shall be accounted for on the basis of the fair market value of such non-cash or in-kind consideration. Gross Revenues shall be calculated prior to any deductions of any kind (including, without limitation, deductions for bad debt, discounts, taxes, returns, or payments provided to any third party), except as expressly permitted herein. For purposes of clarification, Gross Revenues shall include such gross monies and other consideration, paid or payable to or on behalf of a third party (including, without limitation, Licensee's agents, resellers, distributors, or service providers), that are directly or indirectly attributable to a Service (*i.e.*, such gross monies and other consideration shall be determined and calculated "at source").

Gross Revenues shall include but not be limited to:

(1) Subscription Fees: Any monies and other consideration for access to or use of the Service by or on behalf of end users receiving within the United States transmissions made as part of the Service; provided, however, that

(i) where a Licensee offers access to or use of the Service to an end user for free for a limited duration, the fee attributable to such end user shall equal the fee otherwise charged to end users for access to or use of the Service, e.g., where a Service offers "1-month free", the

fee attributable shall be the monthly fee for users not eligible for the "1-month free" promotion; and

(ii) where a Licensee bundles access to or use of the Service (either directly or through a third party) to an end user for a fee, the fee attributable to such end user shall equal the fee otherwise charged to end users for access to or use of the Service, e.g., where a Service bundles commercial-free webcasting with Internet access service for a fee, the subscription revenue attributable to the Service shall be the monthly fee charged on an ala carte basis for the Service, assuming the ala carte version of the Service is the same in material respects to the Service offered as part of the bundled product. Where a Licensee bundles access to or use of the Service (either directly or through a third party) with other products or services and the Service is not offered on an ala carte basis and does not otherwise qualify as a Bundled Service, the subscription revenue attributable to the Service shall be the monthly fee charged for the entire bundled service.

(2) Advertising Revenue: Any monies and other consideration from any text, audio, visual, audio-visual or other advertising, promotions, or sponsorships (collectively "advertising") attributable to the Service, including but not limited to advertising presented:

(i) On or through the Service or the Service's media player;

(ii) On or through pages, interfaces, or displays associated primarily with the Service or predominantly targeted to end users of the Service (e.g., the LaunchCast radio home page and associated pages, the AOL Radio home page and associated pages, or all pages of a website whose primary purpose is provision of the Service, such as the website of a stand-alone webcaster such as AccuRadio.

(iii) On or through pages, interfaces, or displays (not otherwise encompassed in (ii)) from which an end user may launch and/or access a media player to listen to the Service (e.g., pages with "Listen Now" or "Listen Live" buttons), provided that advertising revenue attributable to the Service (as opposed to any other content on the page) shall equal the advertising revenue from such pages multiplied by the ratio of the number of visits to such pages by users that access the Service relative to the number of visits to such pages by all users;

(iv) On or through pages, interfaces, or displays (not otherwise encompassed in (ii)) that contain content related to the Services and other music-related content offered by the Licensee (e.g., a webpage that contains content related to a music video product and a Service such as the Yahoo! Music home page or the AOL Music home page), provided that advertising revenue attributable to the Service (as opposed to any other content on the page) shall equal the advertising revenue from such pages multiplied by the ratio of the number of visits to such pages by users that access the Service relative to the number of visits to such pages by all users);

(v) In e-mails, text messages, SMS messages, premium SMS messages, instant messages, or other communications targeted at or intended for end users or prospective end users of the Service (as opposed to general marketing activities undertaken by Licensee, or a third party on Licensee's behalf, not specifically or separately concerning the Service, Service end users, or prospective end users).

Such advertising revenues shall include the fair market value of barter from third parties or any affiliate of the Service, e.g., advertisements such as (i)-(v) by any affiliate of the Service for other products or services, and shall also include revenues from any other advertising of any

kind that the Licensee actually attributes to the Service. With respect to all types of advertising, the Service may deduct actual advertising agency commissions (not to exceed 15% of those monies or other consideration of each advertisement) actually paid to a recognized advertising agency not owned or controlled by Licensee.

Notwithstanding the foregoing, with respect to sales of advertising that bundle 1) advertising, sponsorships or promotions presented to an end user on or through the Service and 2) advertising, sponsorships or promotions presented to any users of any other Licensee owned, operated, branded, or controlled services or product (e.g., sale of in-stream advertising on a Service bundled with advertising on an over-the-air radio station), the Advertising Revenues attributable to such bundle shall be the fair market value of the Service-only portion of the advertisement, as calculated by the value of such advertising when sold on a stand-alone basis.

(3) Sales of Products and Services: Any monies and other consideration (including, by way of example and without limitation, the proceeds of any revenue-sharing, customer acquisition, customer referral, bounty or commission arrangements with any fulfillment company or other third party, and any charge for shipping or handling) from the sale of any product or service directly through the Service, less

(i) Monies and other consideration received from the sale of phonorecords and digital phonorecord deliveries of sound recordings that have been authorized by the applicable copyright owner,

(ii) The Licensee's actual, out-of-pocket cost to purchase for resale the products or services (except phonorecords and digital phonorecord deliveries of sound recordings) from third parties, or in the case of products produced or services provided by the Licensee, the Licensee's

actual cost to produce the product or provide the service (but not more than the fair market wholesale value of the product or service), and

(iii) Sales and use taxes, shipping, and credit card and fulfillment service fees actually paid to unrelated third parties; provided that:

Notwithstanding the foregoing, the fact that a transaction ultimately is consummated on a different page or location than the Service page/location where a potential customer responds to a "buy button" or other purchase opportunity for a product or service advertised directly through the Service shall not render such purchase outside the scope of Gross Revenues hereunder, and

(4) Software Fees: Any monies and other consideration paid by or on behalf of end users for any software, service or device owned or offered by Licensee (or any subsidiary or other affiliate of the Licensee or a third party on Licensee's behalf) that is required as a condition to access, use, or subscribe to the Service or that enhances use of the Service, and either is purchased by an end user contemporaneously with or after accessing, using, or subscribing to the Service or has no independent function other than to access or enhance the Service; and

(5) Data: Any monies and other consideration for the use and/or exploitation of data specifically and separately concerning the Service and/or end users of the Service, but not monies and other consideration for the use and/or exploitation of data wherein information concerning end users or the Service is commingled with and not separated or distinguished from data that predominantly concern Licensee's other services or end users.

V. TERMS

SoundExchange proposes that many, but not all of the terms of the current regulations, 37 C.F.R. Part 262, be maintained in their current form. SoundExchange proposes those changes to the current regulations described in the testimony of Barrie Kessler, as well as all such changes needed to implement the rate proposal discussed above. Pursuant to Section 351.4(a)(3), SoundExchange reserves the right to propose alternative or additional terms prior to submission of findings and conclusions if warranted by the record.

Respectfully submitted,

By _____

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Dated: September 29, 2006

CERTIFICATE OF SERVICE

I, Albert Peterson, hereby certify that a copy of the foregoing **Reply Findings of Fact and Conclusions of Law of SoundExchange, Inc.** has been served this 15th day of December, 2006 by electronic mail and overnight mail to the following persons:

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